Supreme Court, U.S.
FILED
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No. 99-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

Hospital Service District No. 1 of Tangipahoa Parish, *et al*,
Petitioners,

v.

Surgical Care Center of Hammond,
Respondent.

City of Bossier City, *et al*, *Petitioners*,

v.

Willis-Knighton Medical Center, *Respondent*.

Richland Parish Hospital Service District 1-B, *et al*,
Petitioners,

v.

Ralph Abraham, M.D., *et al*,
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's precedents, local governments have immunity from federal antitrust claims for anticompetitive conduct that is a "foreseeable result" of state law. *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365 (1991); *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985). The *en banc* Fifth Circuit in the cases presented by this Petition read the "foreseeability" standard to require that state law must "displace competition" and "necessarily contemplate" anticompetitive activity, and furthermore held that a state's broadly worded grant of authority to its political subdivision does not confer immunity.

The question presented is:

Whether local antitrust immunity arises (i) only when state law provides a specific grant of statutory authority that "displaces competition" and "necessarily contemplates" the challenged anticompetitive activity (as the Fifth Circuit held here), or instead (ii) when the local government's anticompetitive conduct could be "reasonably foreseen" from a state's broad grant of authority (as the Fourth and Eleventh Circuits hold)?

PARTIES TO THE PROCEEDINGS

This consolidated Petition for a Writ of Certiorari presents for review three judgments of the United States Court of Appeals for the Fifth Circuit. *See* S. Ct. R. 12.4 ("When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices.").

In *Hospital Service District No. 1 of Tangipahoa Parish* v. *Surgical Care Center of Hammond, L.C.*, the plaintiff is Respondent Surgical Care Center of Hammond, L.C., d/b/a St. Luke's SurgiCenter. The defendants are Petitioners Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Medical Center and Quorum Health Resources, LLC.

In *City of Bossier City* v. *Willis-Knighton Medical Center*, the plaintiff is Respondent Willis-Knighton Medical Center. Two defendants – City of Bossier City, La., and Bossier Medical Center – are Petitioners here. The remaining defendants – Carter J. Boyd, M.D., Charles Campbell, M.D., and Charles A. Powers, M.D. – are not parties here.

In *Richland Parish Hospital Service District No. 1* v. *Abraham*, the plaintiffs are Respondents Ralph Abraham, M.D., Randy W. Head, M.D., and Ron Morgan, M.D. Two defendants – Richland Parish Hospital Service District No. 1 d/b/a Richland Parish Medical Center and David Kervin – are Petitioners here. The remaining defendants – Spectrum Emergency Care, Inc., and Robert Maddox, M.D. – are not parties here.

Pursuant to S. Ct. R. 29.6, Petitioners note that Quorum Health Resources, LLC, is a subsidiary of Quorum Health Group, Inc., and that Spectrum Emergency Care, Inc., is a subsidiary of Laidlaw, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

This Petition presents three judgments of the Fifth Circuit. In *Hospital Service District No. 1 of Tangipahoa Parish* v. *Surgical Care Center of Hammond, L.C.* ("*Tangipahoa Parish*"), the order of the district court is unpublished, App. 21-32, the panel opinion of the Fifth Circuit is published at 153 F.3d 220; App. 11-20, and the *en banc* opinion of the Fifth Circuit (per Higginbotham, J.) is published at 171 F.3d 231; App. 1-10. In *City of Bossier City* v. *Willis-Knighton Medical Center* ("*Bossier City*"), the orders of the district court and magistrate judge, App. 34-52, and Fifth Circuit, *id.* 33, are unpublished. In *Richland Parish Hospital Service District No. 1* v. *Abraham* ("*Richland Parish*"), the orders of the district court and magistrate judge, App. 55-68, and Fifth Circuit, *id.* 53-54, are unpublished.

JURISDICTION

The Fifth Circuit entered its judgment in *Tangipahoa Parish* on March 24, 1999, and its judgment in *Bossier City* on March 30, 1999. In both cases, Justice Scalia extended the time to file a Petition for a Writ of Certiorari to and including August 2, 1999. The Fifth Circuit entered its judgment in *Richland Parish* on May 10, 1999. Petitioners invoke this Court's jurisdiction under 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Louisiana Hospital Service District Law, La. Rev. Stat. 46:1051 *et seq.*, are reprinted at App. 69-101.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari presents "the vexing problem of antitrust liability for governmental subdivisions." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 221, at 359 (rev. ed. 1997). The specific question presented is whether states' political subdivisions are immune from federal antitrust liability only when, as the Fifth Circuit held here, App. 6-7, state law provides a specific grant of authority that both "displaces competition" and "necessarily contemplates" the challenged anticompetitive conduct.

Certiorari should be granted for several reasons. This important area of the law is the subject of serious confusion. In particular, the Fifth Circuit's rulings conflict with other circuits' substantially more expansive view of antitrust immunity. Further guidance is needed from this Court, which has never addressed the application of antitrust immunity to cases such as these, in which local governments compete against private businesses.

Certiorari is also warranted because the proper scope of antitrust immunity goes to the heart of the relationship between the federal and state governments. Its resolution will determine whether all manner of state political subdivisions – including cities, towns, and special purpose districts – are subject to costly and burdensome federal antitrust challenges when they provide an array of government services – including health care, waste management, and utilities. The decisions below furthermore contravene basic tenets of federalism by unreasonably interfering with the power of sovereign states to govern through their instrumentalities without intrusion by the federal government.

1. Overview Of Local Antitrust Immunity

"Relying on principles of federalism and state sovereignty," this Court held in *Parker* v. *Brown* that states are immune from federal antitrust liability: "In a dual system of government in which, under the Constitution, the states are

sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. 341, 351 (1943); *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 389 (1991).

Although "[t]he meaning of the Court's holding [in *Parker*] and the scope of the resulting immunity have been in controversy ever since," it is by now well established that a state's immunity may extend to its political subdivisions. P. Areeda & H. Hovenkamp, *supra*, ¶ 221, at 359. Localities, this Court has explained, need not be subject to rigorous antitrust scrutiny because they are "arm[s] of the state," "exposed to public scrutiny," and presumed to "act[] in the public interest." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 & n.9 (1985); *see also id.* at 47 ("Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement."); *City of Columbia*, 499 U.S. at 383 (reiterating "the principle that the antitrust laws regulate business, not politics"). *Town of Hallie* specified that antitrust immunity applies so long as (i) state law permits the activity in question and (ii) the locality acts "pursuant to [a] state policy to displace competition." 471 U.S. at 39 (internal quotation marks omitted).

Town of Hallie held that the latter condition is satisfied if the locality's purportedly anticompetitive conduct is "a *foreseeable result* of" the powers bestowed by the state. 471 U.S. at 42 (emphasis added). Antitrust immunity thus is not limited to instances in which the state "'compelled' [the municipality] to act" anticompetitively or even "stated explicitly that it expected [the municipality] to engage in such conduct." *Id.* at 42, 45. Instead, immunity arises from "broad" delegations of power, *id.* at 42, including when the state "has *delegated* to the cities the express authority to take action that foreseeably will result in anticompetitive effects," *id.* at 43 (emphasis added). Thus, to assert antitrust immunity,

"the municipality need not 'be able to point to a specific, detailed legislative authorization'" of anticompetitive conduct. *Id.* at 39 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (opinion of Brennan, J.)).

In *City of Columbia* – which undertook to "clarify the application of the Sherman Act to municipal governments," 499 U.S. at 367 – the Court "squarely rejected" another proposed limitation on the *Parker* doctrine: that localities have immunity only when they "regulate competition." *Id.* at 373 n.4. The state's policy accordingly need not be express or be designed to displace competition, such as through regulation: "We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the *displacement* of competition. It is enough, we have held, if *suppression* of competition is the 'foreseeable' result of what the statute authorizes." *Id.* at 372-73 (citations omitted) (emphasis added).

2. The Louisiana Hospital Service District Law

Most states in the nation have adopted statutes authorizing the creation and operation of public hospitals. The Louisiana legislature enacted the state's Hospital Service District Law ("HSD law") in 1950. The statute creates hospital service districts as political subdivisions of the state. La. Rev. Stat. 46:1064(a); *Bertrand* v. *Sandoz*, 255 So. 2d 754 (La. 1971). Title to the districts' property and facilities is vested in the public, and the boards of the hospital service districts have the authority to represent the public interest in providing hospital and medical care. La. Rev. Stat. 46:1055(a)(1). The statute also empowers districts to determine the areas they will serve and to acquire other hospitals. *Id.* 46:1051, 1060, 1064. Presently, in twenty-five of Louisiana's sixty-four parishes, a hospital service district owns the only acute care hospital.

From the outset, the Louisiana legislature granted hospital service districts broad authority to contract and to enter

into joint ventures. As originally enacted, the statute "provide[d] for the creation of hospital service districts with all of the powers of a corporation," *Calcasieu-Cameron Hosp. Dist.* v. *Fontenot*, 628 So. 2d 75, 78 (La. App. 1993); La. Rev. Stat. 46:1060, and specifically authorized districts to contract, La. Rev. Stat. 46:1055, and "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district," *id.* 46:1052. Furthermore, the Louisiana Constitution authorized public subdivisions such as hospital districts to "enter into cooperative endeavors with * * * any public or private association, corporation or individual, for a public purpose." La. Const. art. VII, § 14(C); *see also* Op. La. Att'y Gen. 82-106A (Mar. 24, 1982) (authorizing ambulance joint venture by hospital districts); Op. La. Att'y Gen. 78-278 (Mar. 17, 1978) (authorizing district's contribution of funds to state mental hospital).

Notwithstanding such powers, public hospitals have operated under a number of other substantial constraints that have impeded their ability to compete against private hospitals:

> Aging physical plants, high operation costs, ambitious social programs, commitments to medical education and research, and largely-uninsured patient populations make public hospitals comparatively expensive to operate and thus ill-suited to the demands of an increasingly competitive market. Faced with diminishing governmental support, public hospitals – like their private counterparts – have become critically dependent for their survival on attracting the business of managed care groups, whose substantial memberships and capitated payments promise high utilization and steady revenue. * * *
>
> To make matters worse, the vigorous economizing of private hospitals has not simply lowered their costs. It has indirectly raised the costs of public hospitals and

> undermined any attempts they might make to become more competitive. In growing numbers, private hospitals are eliminating or reducing their own small charitable and social service programs and declining to treat "unprofitable" patients, whose age or underlying illnesses make them relatively expensive to serve. * * * Forced in this manner to bear by themselves the financial responsibility for unprofitable services and programs, public hospitals are becoming increasingly more expensive than their private counterparts and thus losing more ground in the competition for managed care contracts.

M. Jacobs, *When Antitrust Fails: The Problems Of Public Hospitals In Increasingly Competitive Markets*, 71 Wash. L. Rev. 899, 901-02 (1996).

The Louisiana legislature has responded by twice amending the HSD law to grant hospital districts extensive powers, which state authorities repeatedly have deemed "broad and sweeping." *See generally infra* at 20-21. In 1984, the Legislature found that the state's hospital service districts were at a "competitive disadvantage" at a time when "the market for hospital and health care services is becoming increasingly competitive." La. Rev. Stat. 46:1071. In order "to enhance the ability of a hospital service district to compete effectively and equally in the market for health care services," *id.*, the Legislature enacted provisions entitled "Enhanced Ability To Compete," which grant hospital service districts unlimited authority, "[n]otwithstanding any law to the contrary," to develop "any plan, strategy, or device developed or intended to construct, operate, maintain a health facility, or engage in providing, promoting, or selling a hospital service," *id.* 46:1072(4), 46:1073. In 1985, the Legislature further authorized the districts, "notwithstanding any other law to the contrary," to "contract with or engage in a joint venture with any person, corporation, partnership, or

group of persons to offer, provide, promote, establish, or sell any hospital health service." *Id.* 46:1077.

3. The Decisions Below

This consolidated Petition presents three cases in which Louisiana public hospital districts successfully asserted in the district court that the HSD law establishes antitrust immunity for various allegedly anticompetitive conduct. We first describe each of the three cases, then address the Fifth Circuit's *en banc* opinion in the *Tangipahoa Parish* case, which held that the HSD law does not confer immunity.[1]

a. *Hospital Service District No. 1 of Tangipahoa Parish v. Surgical Care Center of Hammond, L.C.* ("*Tangipahoa Parish*")

Petitioner Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Medical Center ("North Oaks") has operated an acute care hospital in Hammond, Louisiana for many years pursuant to the HSD law. North Oaks is managed under contract by Petitioner Quorum Health Resources, LLC, a publicly traded hospital management company. North Oaks offers, among many other services, inpatient and outpatient surgery. Respondent Surgical Care Center of Hammond, L.C., d/b/a St. Luke's SurgiCenter ("St. Luke's"), is a for-profit outpatient surgery facility located a quarter mile from North Oaks, which offers some but not all of the same surgical services as North Oaks, but only on an out-patient basis.

St. Luke's filed suit against North Oaks in federal court under the Sherman Act, 15 USC 1, and state competition

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[1] The district court in each case also held that the private defendants (other than Spectrum Emergency Care, Inc., and Robert Maddox, M.D.) had antitrust immunity. App. 30-32, 50-52, 65-67. Because the Fifth Circuit's *en banc* holding made it unnecessary for the court to address the private defendants' immunity, that issue is not presented by this Petition. *Accord City of Columbia*, 499 U.S. at 384 (leaving liability of private defendants open on remand).

laws, La. Rev. Stat. 51:123 (monopolies law); *id.* 15:1405, 15:1409 (unfair trade practice and consumer protection laws). In its complaint, St. Luke's asserted that North Oaks had illegally tied its inpatient surgery and other acute care services, in which it allegedly has monopoly power, to the provision of outpatient surgery in order to gain a monopoly in the outpatient surgery market. Principally, the complaint alleged that North Oaks pressured five of the seven largest managed care plans in the market into signing exclusive contracts.[2]

The district court dismissed the complaint based on anti-trust immunity. "The plain language of [the HSD law] authorizes hospitals to contract with any entity to promote the delivery of health services," and "North Oaks has seen fit to do this by entering into exclusive contracts with health care plans whenever possible." App. 28. To the district court, these exclusive contracts and other allegedly anticompetitive activity asserted by St. Luke's were "an entirely foreseeable result of the Louisiana legislation." *Id.* Indeed, the district court saw North Oaks' use of exclusive contracts as an "attempt to cure the competitive disadvantage suffered by the hospital service districts, the stated goal of the 1984 'competition' amendments." *Id.*[3] On St. Luke's appeal, a panel of the Fifth Circuit affirmed. App. 11-20.

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[2] Although with considerably less emphasis, *see* App. 2-3, 12 & n.1, St. Luke's made other allegations as well, including North Oaks' refusal to enter into an emergency blood type-and-cross match agreement, its refusal to enter into a patient transfer agreement, its attempt to intimidate North Oaks personnel from working at St. Luke's, its refusal to allow nurses from St. Luke's to attend training courses at North Oaks, its attempt to form an alliance with an independent physician association, its acquisition of family practices in hopes of channeling their patients to North Oaks, and its attempt to undermine the practices of two St. Luke's doctors.

[3] The district court declined to exercise jurisdiction over St. Luke's remaining state law claims and accordingly dismissed them without prejudice. App. 31.

b. *City of Bossier City* v. *Willis-Knighton Medical Center* ("*Bossier City*")

Petitioner Bossier City Medical Center ("BMC") provides primary and secondary inpatient and outpatient care. Since 1966, BMC has been owned and operated by Petitioner City of Bossier City, Louisiana. App. 37. In 1996, Respondent Willis-Knighton Medical Center ("WKMC"), a dominant presence in nearby Shreveport, Louisiana, opened WK Bossier Health Center in Bossier City, an acute care hospital providing essentially the same range of services provided by BMC. BMC and WKMC compete for the provision of medical services.

WKMC filed suit under the Sherman Act against BMC and Bossier City based on employment contracts that allegedly require certain physicians to refer all their patients to BMC and preclude them from practicing at WKMC. In addition, WKMC asserted antitrust violations by virtue of BMC's emergency room protocols that allegedly were designed to prevent admissions to WKMC and referrals to physicians practicing there.

The district court, adopting the recommendation of a magistrate judge, dismissed the suit based on antitrust immunity. App. 34-35. The court rejected WKMC's claim that the amendments to the HSD law were designed simply to place BMC and other hospital districts on an equal footing with private hospitals. The court found that the state's delegation of authority to contract rendered it foreseeable that the hospital district would enter into exclusive contracts with anticompetitive effects. *Id.* 47. Likewise, the emergency room referral policies were determined to be "a foreseeable consequence of the statutory authorization for public hospitals to engage in marketing and strategic planning." *Id.* 48.

c. *Richland Parish Hospital Service District* v. *Abraham* ("*Richland Parish*")

Petitioner Richland Parish Hospital Service District 1-B owns and operates Richland Parish Medical Center

("RPMC") in Richland Parish, Louisiana. App. 58. RPMC is an acute care hospital that, according to the Complaint, provides the only emergency room care in the area. Spectrum Emergency Care, Inc. ("Spectrum") is under an exclusive contract to operate the emergency room at RPMC. *Id.* 63-64. Pursuant to that contract, Spectrum hired Robert Maddox, M.D., to work in the emergency room at RPMC. Petitioner David Kervin is the administrator of RPMC.

Respondents Ralph Abraham, M.D., Randy W. Head, M.D., and Ron Morgan, M.D., are general practitioners who maintain offices in Richland Parish. App. 57. They sued Richland Parish Hospital Service District, Spectrum, Maddox, and Kervin under the Sherman Act alleging that they had, for some time, provided emergency care to their patients who came to RPMC, and that Petitioners conspired to boycott them and to preclude them from providing emergency services. In addition, Respondents alleged that Petitioner Maddox sought to dissuade patients from using these doctors and that Maddox refused to provide medical care to patients insisting on using these doctors.

The district court dismissed the case on antitrust immunity grounds, adopting the recommendation of a magistrate judge. To the court, "A hospital's allegedly anti-competitive conduct could have been reasonably anticipated by the Louisiana legislature when it gave hospitals the power to enter a contract with a corporation to provide any hospital health service." App. 63. This constituted the required "clearly articulated and affirmatively expressed intent to exempt hospital service districts from antitrust liability." *Id.*

d. The Fifth Circuit's *en banc* ruling

After a panel affirmed the finding of antitrust immunity in the *Tangipahoa Parish* case, *supra* at 7-9; App. 11-20, the Fifth Circuit granted rehearing *en banc* and unanimously reversed, adopting the narrow view of antitrust immunity pressed by the U.S. Department of Justice and Federal Trade Commission as *amicus curiae*. The *en banc* court acknowl-

edged the "foreseeability" test announced by *Town of Hallie* and *City of Columbia*, but faulted this Court for "declin[ing] to expound a clearer test for separating sufficient authorizations [of anticompetitive activity] from insufficient ones." App. 7. In the Fifth Circuit's view, the standard for finding antitrust immunity therefore "resists any insistence upon a particular formula or expression," *id.* 6, but immunity must be applied narrowly in light of the facts of *Town of Hallie* and *City of Columbia*, as well as a citation in the *Town of Hallie* opinion.

Town of Hallie found that antitrust immunity arose from Wisconsin statutes authorizing cities to determine where they would provide sewer services, 471 U.S. at 38, which the Fifth Circuit deemed to be "much more than a naked grant of authority to contract," App. 6. *City of Columbia* found that immunity arose from zoning statutes, which because they "regulate the use of land and * * * construction," 499 U.S. at 370, have as their "very purpose * * * to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition," *id.* at 372, quoted at App. 7. After reviewing the facts of *Town of Hallie* and *City of Columbia*, the Fifth Circuit explained:

> *Hallie* clarified the "foreseeable result" test. The Court stated, "We think it is clear that anticompetitive effects logically would result from this broad *authority to regulate*." 471 U.S. at 42. The Court favorably cited its emphasis in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), that the statute inherently "displaced unfettered business freedom." *Hallie*, 471 U.S. at 42. Thus arises a distinction between a statute that in empowering a municipality *necessarily contemplates* the anticompetitive activity from one that merely allows a municipality to do what other businesses can do.

Id. (emphasis added).

Looking to precedents of other courts, App. 8-9, the Fifth Circuit noted that the Ninth Circuit had held that a California public hospital statute did not confer antitrust immunity because in the market for hospital services there were "abundant indications that [the] state's policy is to support competition." *Lancaster Comm. Hosp.* v. *Antelope Valley Hosp. District*, 940 F.2d 397, 403 (1991), *cert. denied*, 502 U.S. 1094 (1992). The Fifth Circuit also concluded that the Eleventh Circuit's decision in *FTC* v. *Hospital Board of Directors of Lee County*, 38 F.3d 1184 (1994) – which held that "the anticompetitive conduct [need only] be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute" for immunity to arise, 38 F.3d at 1190-91 – was "broadly consistent with the result here" but "skat[ed] close to an overly lax view" of immunity. App. 9. The Eleventh Circuit's view, the Fifth Circuit believed, "would stand federalism on its head": "A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Id.* 9-10. The Fifth Circuit also distinguished the Fourth Circuit's decision in *Coastal Neuro-Psychiatric Associates* v. *Onslow Memorial Hospital*, 795 F.2d 340 (1986) – which found that North Carolina hospital district statutes created immunity from an antitrust claim arising from peer review procedures – on the ground that North Carolina gave "hospitals the power to determine which physicians may practice in them." App. 8.

Turning to the Louisiana HSD law, the Fifth Circuit held that Petitioners are not entitled to antitrust immunity because, in two respects, the statute does not "necessarily contemplate" anticompetitive conduct:

> Applying this distinction here is straightforward. [i] The Louisiana statute did not subject St. Luke's or any other businesses to the authority of the hospital service district. It merely added to the hospital service district's list of available powers, by enabling it to form

> joint ventures and conduct closed meetings. [ii] Not all joint ventures are anticompetitive. Thus, it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct.

App. 7. The Fifth Circuit instead read the HSD law as nothing more than one of the "naked grants of authority" "by which myriad instruments of local government across the country gain basic corporate powers." *Id.* 9. The court refused "[t]o infer a policy to displace competition from [such an] authority to enter into joint ventures and other business forms." *Id.*

The Fifth Circuit furthermore found that the specific provisions of the HSD law invoked by Petitioners "are not the signals of insulation" from antitrust liability: "They tell us the opposite." App. 8. The court read the 1984 statutory amendments to the HSD law – which provide that they are to be construed "liberally" and "notwithstanding any law to the contrary" to promote the goal of allowing "a hospital service district to compete effectively and equally" – to *undermine* any claim of immunity: "As we read the statute, the word 'equally' qualifies 'effectively,' making clear that the statute's purpose is to level the playing field but no more." *Id.* The Fifth Circuit then extended this inferred purpose of "leveling the playing field" to the 1985 amendment, refusing to adopt a "strict textual reading," and instead construing the statute as "allowing the hospital service district to form joint ventures just as other corporations can, not to allowing formation of joint ventures that with any other lineage would be anticompetitive." *Id.*

Based on the *en banc* court's ruling in *Tangipahoa Parish*, panels of the Fifth Circuit summarily reversed the findings of antitrust immunity in the *Bossier City* and *Richland Parish* cases as well. App. 33, 53-54. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the rulings below conflict with decisions of this Court and other circuits. In addition, the scope of antitrust immunity is unresolved, often litigated, and presents a question central to the relationship between the federal and state governments.

1. The Decisions Below Are Erroneous And Conflict With this Court's Precedents.

a. The decisions below conflict with *Town of Hallie* and *City of Columbia.*

The decisions below rest on three legal conclusions that conflict directly with *Town of Hallie* and *City of Columbia.* First, by requiring that state law must "necessarily contemplate" local anticompetitive activity, the court of appeals has converted this Court's "foreseeability" test into a far more stringent requirement: that anticompetitive conduct actually be "foreseen" by the state. As the Eleventh Circuit has noted in rejecting the same rule, the Fifth Circuit's standard "turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition." *FTC* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1190 (1994). In point of fact, in *Town of Hallie*, the "necessarily contemplates" standard was pressed by the plaintiffs, opposed by the federal government, and *rejected* by this Court. The plaintiffs there unsuccessfully argued that "the particular anticompetitive conduct of the city [must] '*necessarily* follow[]' from the State's clear, affirmative declaration of the State policy." Petrs' Br. at 27 (emphasis added).[4]

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[4] The United States has substantially reversed course from the position it took before this Court in *Town of Hallie*, where it contended:

> We do *not* believe that it is necessary, as petitioners argue (Br. 14-17), to require the state to compel the city's action in order for it to be immune from the Sherman Act, or that the City's action be "necessary" to accomplish the state's purpose. If the authority

Although the Fifth Circuit purported to derive its restrictive view of antitrust immunity from the facts of *Town of Hallie* and *City of Columbia*, App. 6-7, the statutes in those cases could not have survived the stringent test applied below. The Wisconsin sewage statute in *Town of Hallie* did not "necessarily contemplate" anticompetitive conduct, but instead left to municipalities "whether to provide sewage services" at all and, if so, whether "to pursue either anticompetitive conduct or free-market competition in the field of sewage services." 471 U.S. at 43 & n.6. The Fifth Circuit's assertion that immunity does not arise from a statute "that merely allows a municipality to do what other businesses can do," App. 7, similarly cannot be squared with the Wisconsin statutes, which gave cities the corporate power to determine whether to provide service to third parties.

Nor was the Fifth Circuit correct to emphasize that "not all joint ventures are anticompetitive," App. 7. It is equally true that "not *all* zoning is anticompetitive." A city, for example, may expand the range of property that is available for commercial development, thereby *increasing* competition. This Court nonetheless held in *City of Columbia* that zoning laws confer antitrust immunity because some restrictive zoning may limit entry into the marketplace. 499 U.S. at 373

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granted by the statute indicates that the legislature *contemplated the type of anticompetitive activity at issue*, then it can be presumed that the legislature has considered the reasonably foreseeable consequences of the conduct and has determined that such an exercise of the agency's discretion will further the interests of the state as a whole. Certainly *it would be inappropriate* for the federal courts in the context of antitrust litigation to examine the city's action any more intrusively; "[c]ourts * * * are ill equipped to determine in many cases whether a restraint was necessary." [*Hybud Equipment Corp.* v. *City of Akron* 742 F.2d 949, 960 (6th Cir. 1984).]

Br. for United States at 18 (emphasis added).

(explaining that restrictive zoning "necessarily protects existing billboards against some competition").[5]

Second, by construing the HSD law to constitute merely a "naked grant[] of authority" insufficient to confer immunity, the Fifth Circuit ignored this Court's plain holding that "the municipality need not 'be able to point to a specific, detailed legislative authorization.'" *Town of Hallie*, 471 U.S. at 39 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (opinion of Brennan, J.)). To the contrary, immunity arises from a statute that "delegate[s] to the cities the express authority to take action that foreseeably will result in anticompetitive effects." *Id.* at 43. As commentators have noted, *Town of Hallie*'s use of "the term 'authorization' generally implies that the authorized entity *has discretion* whether to do the authorized activity." P. Areeda & H. Hovenkamp, *supra*, ¶ 222, at 389 (emphasis added).

Third, the court of appeals erred in holding that antitrust immunity is available only when state law provides for the "displacement of competition" and that, accordingly, immunity is unavailable here because the HSD law does not "subject [Respondents] to the authority of the hospital service district." App. 7. The Wisconsin sewage statute in *Town of Hallie* merely granted the city the authority to determine which areas it would serve; it did not purport to regulate the plaintiffs who sought to require the defendant city to extend its sewer service. 471 U.S. at 41. *City of Columbia* accordingly recognized that *Town of Hallie* "squarely rejected" any requirement that the state must confer on localities the

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[5] The Fifth Circuit's holding is, moreover, wrong even on its own terms, for all joint ventures can be considered "anticompetitive" in the sense that they "necessarily protect" the partners to the venture against competition from each other and otherwise may reduce market entrants. *Accord Town of Hallie*, 471 U.S. at 42 n.5 (in a joint venture, "the two combined [entities] might well be more effective than either alone in keeping other municipalities out of the market").

"authority to regulate competition." 499 U.S. at 373 n.4. The Court clearly explained, "We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the *displacement* of competition. It is enough, we have held, if *suppression* of competition is the 'foreseeable' result of what the statute authorizes." *Id.* at 372-73 (citations omitted) (emphasis added).[6]

Nor is the Fifth Circuit correct that the "foreseeability" standard applied by the district court in these cases and the original panel in the *Tangipahoa Parish* case would require states "to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant," App. 9-10. To the contrary, experience in other circuits, *see infra* at 22-29, shows that states frequently grant hospital districts and other instrumentalities broad powers that must fairly be read to encompass antitrust immunity. The relevant policy considerations, therefore, are those set out in *Town of Hallie* and *City of Columbia*, which direct that local antitrust immunity is to be read broadly. The federal courts need not apply the same rigorous antitrust analysis used for private businesses to local governments, which are "arm[s] of the state" that operate in the public eye and for the public interest. *Town of Hallie*, 471 U.S. at 45 & n.9. When a federal court, as here, instead finds that state law providing broad powers does not confer immunity, it "embodies an unrealistic view of how

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[6] The Fifth Circuit put substantial weight on *Town of Hallie*'s parenthetical citation to *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), in which a state statute "inherently displaced unfettered business freedom." App. 7 (quoting *Town of Hallie*, 471 U.S. at 42). But nothing in the *Town of Hallie* opinion suggests that the Court intended this citation to alter the otherwise plain "foreseeability" standard. To the contrary, this Court repeatedly has cited *Orrin W. Fox* without suggesting that it imposes a heightened burden. *Hoover* v. *Ronvin*, 466 U.S. 558, 568 (1984); *Community Comms. Co.* v. *City of Boulder*, 455 U.S. 40, 51 (1982); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, 445 U.S. 97, 105 (1980).

legislatures work and of how statutes are written," imposes "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," and sets too loose a standard on which "the criminal liability of public officials ought to depend." *City of Columbia*, 499 U.S. at 373 n.4; *Town of Hallie*, 471 U.S. at 44 & n.7.

b. Petitioners' conduct is a "foreseeable result" of the Louisiana HSD law.

Under the "foreseeability" test mandated by *Town of Hallie* and *City of Columbia*, Petitioners are entitled to immunity from Respondents' antitrust allegations. *See, e.g.*, App. 2 (allegation of exclusive managed care contracts in *Tangipahoa Parish*), 38 (allegation of exclusive physician contracts in *Bossier City*), 58 (allegation of exclusive emergency room services contract in *Richland Parish*). The HSD law confers on Petitioners a clear and comprehensive authority to contract, which is to be "liberally construed," as well as authority to enter into joint ventures, both of which are to be applied "notwithstanding *any* law to the contrary." La. Rev. Stat. 46:1071, 46:1077 (emphasis added). This authority necessarily includes the power not to enter into such arrangements and, conversely, the power to enter into *exclusive* contracts and joint ventures. If the Louisiana legislature intended some further restriction, it could have and would have so provided.

The Fifth Circuit's contrary conclusion that the HSD law merely "level[ed] the playing field" between public and private hospitals, citing a clause in the 1984 amendments to the HSD law that declares a purpose to "enhance the ability of a hospital service district to compete effectively and equally," misreads the statute in two important respects. First, it erroneously applies the "compete effectively and equally" clause to the *separate* 1985 amendment to the HSD law, which provides hospital service districts with the distinct authority to enter into joint ventures "notwithstanding any other law to

the contrary." *Compare* La. Rev. Stat. 46:1071-46:1076 *with id.* 46:1077.

Second, the Fifth Circuit read "equally" in the 1984 amendments to mean "identically," holding that the statute merely confers on public hospitals the identical power to compete as private hospitals. On this reading, the statute merely exempts public hospitals from "Louisiana's general restrictions on the activities of its public corporations." App. 7. The 1984 and 1985 amendments, however, grant authority to hospital districts "notwithstanding *any* other law to the contrary," language that unambiguously reaches the Sherman Act, as the Fifth Circuit acknowledged in its back-handed refusal to employ a "strict textual reading" of the statute, App. 8. No doubt, of the 1984 and 1985 amendments also eliminated some restrictions imposed on public hospitals as governmental entities, but the amendments generally specify those restrictions. *E.g.*, La. Rev. Stat. 46:1073(B) (power to hold executive sessions "[n]otwithstanding the provisions of R.S. 42:4.1" (requirement of public meetings) "or any other law to the contrary" (emphasis added)); *id.* 46:1073(C) (exemption from La. Rev. Stat. 44:1 (public records law) "*or any* other law to the contrary" (emphasis added)).

In addition, Louisiana public hospitals have had the power to contract and to enter into joint ventures for almost fifty years under both the Louisiana Constitution and the HSD law as originally enacted. La. Const. art. VII, §14(C); La. Rev. Stat. 46:1055, 46:1060. By the mid-1980s, the state Legislature concluded that public hospitals were suffering from "competitive disadvantages" and responded by expanding the authority of hospitals districts still further. La. Rev. Stat. 46:1071, 46:1077. But the Legislature did not eliminate the other inherent disadvantages under which public hospitals operate – such as "[a]ging physical plants, high operation costs, ambitious social programs, commitments to medical education and research, and largely-uninsured patient populations" – which, in particular, are causing public

hospitals to lose "ground in the competition for managed care contracts." M. Jacobs, *When Antitrust Fails: The Problems Of Public Hospitals In Increasingly Competitive Markets*, *supra*, at 901-02; *see also* Op. La. Att'y Gen. 1946-48, at 299 (principal obligation of public hospital district is indigent care). By granting further powers to contract and to enter into joint ventures "notwithstanding any law to the contrary," the amendments compensate for the many other inherent competitive disadvantages suffered by public hospitals.

The conduct alleged by Respondents thus is a "foreseeable result" of the HSD law. Exclusive contracts with managed care companies, physicians, and emergency room service providers are integral to the cost-effective delivery of hospital health services. Such contracts prevent profit-driven, single-purpose facilities such as St. Luke's from siphoning off the population of paying clients with private insurance, thereby leaving public hospitals with a disproportionate share of uninsured, underinsured, or indigent patients. In turn, funds from paying patients make it possible for public hospitals to fulfill their obligations to provide care for those who cannot afford it and also to fund medical research and education. This is what the Louisiana legislature intended when it acted to overcome the "competitive disadvantages" of public hospitals.

The Fifth Circuit's narrow construction of the HSD law furthermore fails to heed this Court's purposeful adoption of the broad "foreseeability" standard in order to avoid "embroil[ing] the federal courts in the unnecessary interpretation of state statutes," *City of Columbia*, 499 U.S. at 373 n.4. The three district judges in these cases, as well as the original panel in the *Tangipahoa Parish* case, all found that anticompetitive conduct was the foreseeable result of the 1984 and 1985 amendments, while the *en banc* court read the identical statutes to require the opposite result. Of note, the state's Attorney General reads the 1984 and 1985 amendments to

"provide *broad and sweeping* authority for confecting written agreements to carry out the provisions of hospital health services through joint ventures." Op. La. Att'y Gen. 96-350 (Oct. 29, 1996) (emphasis added); *see also* Op. La. Att'y Gen. 95-395 (Nov. 7, 1995) (same). The statute thus embodies a "broad authority to execute contracts *of every kind* in order to carry out the objects and purposes of a [hospital] district." Op. La. Att'y Gen. 96-510 (Jan. 14, 1997) (emphasis added); *see also* Op. La. Att'y Gen. 97-7 (Feb. 24, 1997) (1985 amendment "was enacted to facilitate contracts and/or joint-ventures for hospital health services").

2. The Decisions Below Accord With The Ninth Circuit But Conflict With Rulings Of The Fourth and Eleventh Circuits.

Certiorari also is warranted because, although this Court has held that antitrust immunity applies when municipal conduct is the "foreseeable" result of authority granted by the state, "the meaning of 'foreseeable' is not self-evident, and some courts have found more activities to be 'foreseeable' than have others." P. Areeda & H. Hovenkamp, *supra*, ¶ 225, at 451. In particular, the decisions below are consistent with the Ninth Circuit's antitrust immunity holdings but conflict with multiple decisions of the Fourth and Eleventh Circuits.

a. The Ninth Circuit

The Ninth Circuit reached the same result as the decisions below in *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (1991), which held that California's public hospital district statute does not confer antitrust immunity. Two points, both relating to the fact that public hospitals lack regulatory powers, led to this holding. "First, the state has given the [hospital districts] no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors." 940 F.2d at 402. Second, the Ninth Circuit found "numerous concrete legislative actions

that indicate California, instead of making regulation the order of the day in the hospital service sector of the economy, has committed itself to a competitive market." *Id.* at 403. These were statutes authorizing public hospital districts to transfer assets to private nonprofit corporations and limiting the mandatory disclosure of public hospital contracts, as well as statutes facilitating deregulation in the hospital market generally. *Id.* n.12. As a result, "the foreseeable result of the statutory scheme before us is that hospital districts * * * will compete, not that they will preclude competition by others." *Id.* at 403.

b. The Eleventh Circuit

The rulings below and the Ninth Circuit's decision in *Lancaster* conflict with multiple decisions of the Eleventh Circuit. In particular, that court rejected the identical conditions on antitrust immunity accepted by the Fifth Circuit when raised by the United States in *FTC* v. *Hospital Board of Directors of Lee County*, *supra*, 38 F.3d 1184 (1994). *Accord* Br. For U.S. & F.T.C., *Tangipahoa Parish*, at 16 ("we think *Lee County* was wrongly decided for several reasons"). In *Lee County*, the Eleventh Circuit found that antitrust immunity arose from a Florida statute, indistinguishable from the Louisiana HSD law, granting public hospitals authority to operate and to enter into ventures with other hospitals. 38 F.3d at 1188 (quoting 1963 Fla. Spec. Laws ch. 63-1552, § 1, as amended by ch. 87-438, § 1; *id.* ch. 63-1552, § 23, as amended by ch. 87-438, § 7). Contrary to the Fifth Circuit's "necessarily contemplates" standard, the Eleventh Circuit relied on embedded circuit precedent to hold that antitrust immunity applies even when the challenged anticompetitive conduct is "not the inevitable, *or even the routine or ordinary*[,] result of the power" granted by the state. 38 F.3d at 1190 (emphasis added) (discussing *Central Fla. Clinic for Rehab.* v. *Citrus County Hosp. Bd.*, 738 F. Supp. 459 (M.D. Fla.), *aff'd without op.*, 888 F.2d 1396 (11th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381 (11th Cir. 1993); *Commuter Transp. Sys.*

v. *Hillsborough County Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986)).[7]

The Eleventh Circuit thus expressly rejected the F.T.C.'s view, which the Fifth Circuit accepted in these cases, that the state must "necessarily contemplate[] the anticompetitive activity":

> By attempting to impose a narrow definition of the term "foreseeable," the [Federal Trade] Commission essentially seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition. However, in *Central Florida*, *Bolt*, and *Commuter Transportation*, this Circuit has required only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute.

38 F.3d at 1190-91. The Eleventh Circuit specifically

> reject[ed] the suggestion that, in order to render anticompetitive conduct foreseeable, a state must enact either specific legislation from which anticompetitive conduct must ordinarily or routinely occur or specific legislation creating regulatory or monopolistic powers. No such bright line definition or condition has ever been embraced by the Supreme Court or this Circuit.

Id. at 1191.

The Eleventh Circuit in *Lee County* furthermore expressly rejected two conditions on immunity imposed by the Fifth Circuit, holding that immunity arises notwithstanding that a public hospital (i) "was given powers to act exactly as private hospitals would act," 38 F.3d at 1184 n.5; *contra*

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[7] The original Fifth Circuit panel in *Tangipahoa Parish* relied on the Eleventh Circuit's decision in *Central Florida Clinic For Rehabilitation* in holding that the HSD law confers antitrust immunity, noting Respondent St. Luke's argument that the Eleventh Circuit's ruling was "wrongly decided." App. 19.

App. 7 (no immunity because HSD law "merely allows a municipality to do what other businesses can do"), and (ii) lacks "regulatory powers," 38 F.3d at 1184 n.5; *contra* App. 7 (no immunity because HSD law "did not subject St. Luke's or any other businesses to the authority of the hospital service district").

The Fifth Circuit in these cases acknowledged that the Eleventh Circuit applies a substantially more lenient standard for finding antitrust immunity, App. 9, but asserted that *Lee County* is "broadly consistent with the result here" because it purportedly "emphasized that when the [Florida] legislature authorized a hospital to acquire other hospitals, it already knew the hospital was a monopoly," *id.* That is incorrect both factually and legally. Factually, no distinction exists between this case and *Lee County* because, by the time the Louisiana legislature amended the HSD law in 1984 and 1985, public hospital districts operated the only acute care hospital in many of the state's hospital districts. In addition, the Florida public hospital statutes considered by the Eleventh Circuit in *Lee County* cannot fairly be distinguished from Louisiana's HSD law.[8]

As a legal matter, no relevant distinction exists because, although the *Lee County* opinion discusses the monopoly status of the hospital in that case, the Eleventh Circuit ar-

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[8] *Compare* 1963 Fla. Spec. Laws ch. 63-1552, § 1, as amended by ch. 87-438, § 1 (purpose to "establish and provide for the operation and maintenance of additional hospitals; satellite hospitals; clinics; or other facilities devoted to the provision of healthcare services") *and id.* § 23, as amended by ch. 87-438, § 7 (authority to "be a partner in, or participate in or control, any venture, corporation, partnership, or other organization, public or private * * * in furtherance of, the purposes and best interests of the hospital") *with* La. Rev. Stat. 46:1024 (purpose "[t]o own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care") *and id.* 46:1077 (power to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health services").

ticulated its *legal standard* without regard to that point. *Cf.* 38 F.3d at 1187 (finding immunity notwithstanding that the district court had never considered "the actual anticompetitive impact of the acquisition"). The standard announced in *Lee County* and set out in the preceding paragraphs is categorical, not dependent in any respect on the hospital's monopoly status.

The Fifth Circuit's claimed distinction also is plainly wrong in light of subsequent Eleventh Circuit decisions that repeatedly rely on the *Lee County* "reasonably anticipated" standard without *ever* considering whether the relevant state law regulated a pre-existing monopoly. Thus, unlike the Fifth Circuit's refusal here to find immunity in purportedly "naked grants of authority," App. 9, the Eleventh Circuit has concluded that a Florida statute providing "open-ended authority" to select insurance contractors provides immunity because it "*could* result in *potentially* anticompetitive" conduct. *Bankers Ins. Co.* v. *Florida Res. Prop. & Cas. Joint Under. Assn.*, 137 F.3d 1293, 1298 (1998) (emphasis added) (citing *Lee County*, *supra*). Similarly, the Eleventh Circuit has quoted and applied the *Lee County* "reasonably anticipated" standard to hold that a statute conferring control over hospital staff privileges grants antitrust immunity. *Crosby* v. *Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1532 (1996). The Eleventh Circuit's decisions prior to *Lee County* also consistently apply the lenient "reasonably foreseeable" standard without regard to the municipality's monopoly status, as do district court decisions within the Eleventh Circuit.[9] Finally, the Eleventh Circuit has declined

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[9] *E.g.*, *Bolt*, *supra*, 980 F.2d 1381; *McCallum* v. *City of Athens*, 976 F.2d 649, 652 (1992) (antitrust immunity is created by "a broad regulatory structure" that "contemplated that such [anticompetitive] conduct might occur" (emphasis added) (citation omitted)); *James Emory, Inc.* v. *Twiggs County, Ga.*, 883 F. Supp. 1546, 1561 (M.D. Ga. 1995) ("broad and expansive grants of power within a specified field and for a particular purpose may be fairly construed to contemplate that an authority might displace competition" (citation and quotation marks omitted));

to follow the Ninth Circuit's Decision in *Lancaster* in finding that a hospital district statute confers antitrust immunity. *See Bolt* v. *Halifax Hosp. Med. Ctr.*, *supra*, 980 F.2d at 1393 (Clark, J., dissenting) (arguing for adoption of *Lancaster*).

c. The Fourth Circuit

The rulings below also conflict with decisions of the Fourth Circuit. In *Coastal Neuro-Psychiatric Associates* v. *Onslow Memorial Hospital*, *supra*, 795 F.2d 340 (1986), the Fourth Circuit held that a municipality was immune from an antitrust claim arising from its refusal to grant the plaintiffs hospital privileges. Quoting *Town of Hallie*'s conclusion that a statute providing a "broad authority to regulate" confers antitrust immunity, 471 U.S. at 42, the Fourth Circuit found that North Carolina "likewise contemplate[d] anticompetitive effects" through its hospital service district law, which broadly authorizes municipalities to create and to operate hospitals. 795 F.2d at 341 (citing N.C. Gen. Stat. § 131E-5). Directly contrary to the Fourth Circuit's view, the Fifth Circuit here refused to find antitrust immunity, despite the fact that Louisiana has granted its municipalities the indistinguishable authority to create and to operate hospitals.[10] *Accord* App. 8 (original panel opinion in *Tangipahoa Parish* finding immunity, relying on *Coastal Neuro*).

Golta, Inc. v. *Greater Orlando Av. Auth.*, 761 F. Supp. 778, 781 (M.D. Fla. 1991) (defendants' "showing that they had general authority to act as they did will suffice"); *Davis* v. *Southern Bell Tel. & Tel. Co.*, 755 F. Supp. 1532, 1537 (S.D. Fla. 1991) ("the State need only permit the alleged restraint"; immunity arises from "broad authority to regulate" (emphasis added)); *Central Fla. Clinic for Rehab.* v. *Citrus County Hosp. Bd.*, 738 F. Supp. 459, 464 (M.D. Fla. 1989) (general grant of authority to operate hospitals conferred immunity because statute would attempt to monopolize separate market for outpatient services).

[10] *Compare also* N.C. Gen. Stat. § 131E-5(b), (d) (statute's purpose is for "municipalities to construct, operate and maintain hospital and other facilities which furnish hospital, clinical and similar services" and "to cooperate with other public and private agencies and with each other"; "This Part shall be construed liberally to effect its purposes") *with* La. Rev. Stat. 46:1052, 46:1071 (statute's purpose is for municipalities to

The Fifth Circuit's passing suggestion that *Coastal Neuro* can be distinguished because a specific North Carolina statute gave "hospitals the power to determine which physicians may practice in them," App. 8, is incorrect for two reasons. First, the Fourth and Fifth Circuits apply conflicting tests for finding antitrust immunity, leading to markedly inconsistent results. The Fifth Circuit holds that state law must "*necessarily* contemplate[] the anticompetitive activity," App. 7 (emphasis added), while the Fourth Circuit requires only that reduced competition "may" result from state law, *Coastal Neuro*, 795 F.2d at 342. Applying this standard, the Fifth Circuit deemed Louisiana's public hospital law to be a "naked grant[] of authority" that could not confer antitrust immunity, App. 9, while the Fourth Circuit found that the indistinguishable "broad authority" granted by North Carolina's statute contemplated sufficient "anticompetitive effects," 795 F.2d at 341.[11] Second, Louisiana provides mu-

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"own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care" and to "cooperate with other public and private institutions and agencies"; "Towards this end, the provisions of R.S. 46:1071 through 1076 [entitled Enhanced Ability To Compete] shall be construed liberally").

[11] For district court decisions within the Fourth Circuit finding antitrust immunity based on the authority of *Coastal-Neuro* without regard to the hospital privileges statute distinguished by the Fifth Circuit, see, *e.g.*, *Nursing Registry* v. *Eastern N.C. Reg. Emer. Med. Serv. Consort.*, 959 F. Supp. 298, 306-07 (E.D.N.C. 1997) (under *Coastal-Neuro*, immunity applies when municipality has "wide latitude to regulate, establish, or contract"); *Hillman Flying Serv.* v. *City of Roanoke*, 652 F. Supp. 1142 (W.D. Va. 1987), *aff'd without op.*, 846 F.2d 71 (4th Cir. 1988) (*Coastal-Neuro* found immunity "even though [the municipality] operated under a broad and unspecific state grant of authority to construct, and maintain hospitals"). *See also Command Force Sec.* v. *City of Portsmouth*, 968 F. Supp. 1069, 1073 (E.D. Va. 1997) (immunity when state law "may occasionally require" the allegedly anticompetitive conduct), *aff'd sub nom.*, *American International Security Specialists* v. *Roberts*, No. 97-2089, 1998 U.S. App. LEXIS 22128 (4th Cir. Sept. 10, 1998) (immunity applies because, under state law, "a municipality might allow" the allegedly anticompetitive conduct).

nicipal hospitals the same authority as North Carolina to grant or to deny hospital privileges,[12] but the Fifth Circuit nonetheless held that antitrust immunity does *not* bar the claim that Petitioners unlawfully sought to leverage hospital-privilege rights, *see supra* at 10-11 (describing the *Richland Parish* case).

The conflict between the Fourth and Fifth Circuits also is plain from *Coastal Neuro*'s progeny. In particular, this Court's decision in *City of Columbia* specifically *affirms* the Fourth Circuit's application of the *Coastal Neuro* standard. In *City of Columbia*, the Fourth Circuit held that South Carolina's "general zoning statutes" barred a Sherman Act claim founded on a billboard ordinance which favored a particular competitor. 891 F.2d 1127, 1132 (1989). Relying directly on *Coastal Neuro* – which the Fourth Circuit explained "dealt leniently with the question of legislative contemplation of an anticompetitive effect" – the court held that antitrust immunity arises from a general "authority to regulate." *Id.* On certiorari, this Court reviewed and approved the Fourth Circuit's application of the "foreseeability" standard, concluding that "[t]he Court of Appeals therefore was correct." 499 U.S. at 373-74. Additionally, in *Sandcrest Outpatient Services* v. *Cumberland County Hospital System*, the Fourth Circuit held (per Justice Powell, the author of *Town of Hallie*, in retirement) that a municipal hospital was immune from a group boycott claim because the conduct in question – terminating an emergency services contract – was "not prohibit[ed]" and was "consistent with [the] broad authority and responsibility" granted to public hospitals under state law. 853 F.2d 1139, 1143-44 (1989).

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[12] *Compare* N.C. Gen. Stat. § 131E-5(a) (hospitals have authority to grant and deny physician privileges) *with* La. Rev. Stat. 37:1301(B), 40:2114(C) (same).

3. This Important Question Recurs Frequently And Presents A Significant Application Of Antitrust Immunity Not Yet Addressed by This Court.

Certiorari furthermore is warranted because the application of antitrust immunity to state political subdivisions is the subject of substantial continuing uncertainty, such that the question presented recurs frequently. As authoritative commentators recently have noted, "Supreme Court opinions in this area have been particularly divided" and, despite some efforts at clarity, "the appropriate scope of the antitrust 'state action' immunity has always been a difficult issue for the Court, and thus for those who follow it." P. Areeda & H. Hovenkamp, *supra*, ¶ 221, at 359. Although this Petition focuses on the Fourth, Fifth, Ninth, and Eleventh Circuits' application of antitrust immunity to public hospital districts, all of the courts of appeals regularly confront this issue in the context of a wide variety of governmental services.[13]

This Petition provides the Court with not only the opportunity to clarify the "foreseeability" standard but also a unique opportunity to apply the standard to the varied allegations of anticompetitive conduct in three separate cases. The Fifth Circuit, by contrast, improperly ruled with an exceedingly broad brush, never pausing to address the specific allegations of anticompetitive conduct raised by Respondents. This Petition also gives this Court the opportunity to address the application of antitrust immunity to cases in which a local government competes against private businesses.

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[13] *E.g.*, *Omega Homes* v. *City of Buffalo*, 171 F.3d 755 (2d Cir.) (per curiam) (urban renewal), *pet. for cert. pending*, No. 99-135 (July 19, 1999); *Southern Disposal* v. *Texas Waste Mgmt.*, 161 F.3d 1259 (10th Cir. 1998) (waste management); *Four T's* v. *Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997) (power to manage airport); *Yeager's Fuel* v. *Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (loans and rebates to encourage conservation); *Fisichelli v. City Known As Town of Methuen*, 956 F.2d 12 (1st Cir. 1992) (per Breyer, J.) (power "to grant, or to deny, a development bond").

Finally, certiorari should be granted because the scope of antitrust immunity is central to the relationship between the federal and state governments. "The importance of *Parker*'s status as an immunity is particularly strong when the defendant is a government agency, subdivision, or government official carrying out duties." P. Areeda & H. Hovenkamp, *supra*, ¶ 222b, at 393. Here, the Fifth Circuit has imposed a substantial and unwarranted restriction on sovereign states' power to govern through their instrumentalities without federal intrusion. Left unaddressed, the new standard imposed by these decisions will require states to reformulate existing statutes in order to protect localities from antitrust challenges. Before the federal courts impose such a burden, review in this Court is warranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 2, 1999

SURGICAL CARE CENTER OF HAMMOND, L.C., doing business as St Luke's SurgiCenter; Plaintiff-Appellant

versus

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, doing business as North Oaks Medical Center; QUORUM HEALTH RESOURCES, INCORPORATED; Defendants-Appellees

No. 97-30887

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

March 24, 1999

COUNSEL: For SURGICAL CARE CENTER OF HAMMOND, L.C., Plaintiff - Appellant: Donna Guinn Klein, Craig Lewis Caesar, McGlinchey Stafford, New Orleans, LA.

For FEDERAL TRADE COMMISSION, Amicus Curiae: David W. Seidman, US Department of Justice, Washington, DC.

For HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, QUORUM HEALTH RESOURCES, INCORPORATED, Defendants - Appellees: Robert S. Rooth, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, LA. L. Kenneth Krogstad, Wilbur Anthony Toups, III, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, LA. Daniel M. Mulholland, III, Horty Springer & Mattern, Pittsburgh, PA. Susan M. Lapenta, Horty, Springer & Mattern, Pittsburgh, PA.

For WILLIS-KNIGHTON MEDICAL CENTER, Amicus Curiae: Janet L. McDavid, Washington, DC. John Glover Roberts, Jr., Hogan & Hartson, Washington, DC. Gregory

George Garre, Hogan & Hartson, Washington, DC. James Charles McMichael, Jr., McMichael, Medlin & Weir, Shreveport, LA.

In this antitrust case against a hospital district in Hammond, Louisiana, filed by a privately owned competitor, the district court concluded that the state legislature had granted the hospital district immunity from federal antitrust laws, dismissed those claims, and declined to exercise supplemental jurisdiction over related state claims charging violations of state antitrust and consumer protection laws. A panel of this court affirmed, believing it was bound to do so by prior decisions of the court. We took the case en banc and now reverse the judgment of dismissal and remand to the district court for further proceedings. The Louisiana legislature did not make sufficiently clear an intent to exercise its authority to insulate its creature of state government from the constraints of the Sherman Antitrust Act, an authority recognized in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), and progeny, including *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985).

I. Through its North Oaks facility, Hospital Service District No. 1 of Tangipahoa Parish offers acute care and surgical services. North Oaks is managed for the district by Quorum, a privately owned management firm engaged in the business of managing hospitals for profit. The state-owned hospital competes with St. Luke's, a privately owned hospital located only a quarter mile away and the only outpatient surgery center in the immediate area.

St. Luke's filed this suit in 1997 alleging that North Oaks enjoyed a monopoly in the local market for acute care services and was attempting to extend its monopoly to outpatient surgical care. The complaint also outlined the implementing path of the effort, marked by various anticompetitive acts. These acts included pressuring five of the seven largest managed care plans in the market into

contracts calculated to exclude St. Luke's from the market for outpatient surgical care. Specifically, North Oaks allegedly used its monopoly power to ensure that its contracts with the plans included provisions for exclusivity and tying, in violation of the Sherman Act and the Louisiana Monopolies Law, La. Rev. Stat. § 51:123, and the Louisiana Unfair Trade Practice and Consumer Protection Law, *id.* §§ 51:1405 to 51:1409.

North Oaks and Quorum moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), pointing to the Louisiana Service District Law, La. Rev. Stat. §§ 45:1051 et seq., which establishes the hospital service districts as political subdivisions of the State of Louisiana. *See id.* § 46:1064(A). North Oaks urged that as a political subdivision it enjoyed "immunity" from the Sherman Antitrust Act as announced in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), and as applied by this court in *Martin v. Memorial Hospital*, 86 F.3d 1391 (5th Cir. 1996). Quorum denied it was an independent player, asserting that it was only the agent for the district, an entity enjoying immunity from federal antitrust laws. The district court granted the motion, dismissing both defendants.

The district court conceived its question as "whether the alleged noncompetitive activities of North Oaks may be fairly considered the foreseeable result of the state policy articulated in the Louisiana Hospital Service District Law." It concluded that the exclusive contracts were the "foreseeable result" of statutory authority to contract "with any entity to promote the delivery of health services." Other alleged anticompetitive practices were found to be either "foreseeable results of the statutory license for hospitals to develop confidential marketing strategies," or "clearly in the realm of the routine business decisions concerning day-to-day operations to which the state action immunity should apply." The court concluded that Quorum, although not a political subdivision of the state, acted only as an agent of

the district and "therefore requires no separate grant of immunity." St. Luke's appealed.

A panel of this court agreed with the district court that the hospital district enjoyed immunity. Applying our decision in *Martin*, it held that North Oaks was immune because the alleged anticompetitive acts were the foreseeable results of the statutory grant of authority to the hospital district. Chief Judge King specially concurred, "troubled by [this court's] opinion in *Martin*". As we will explain, the district court's analysis reflected its reading of *Martin*, a reading we are persuaded is not faithful to the foreseeability test of the Supreme Court. However justified by uncertainties in our case law, any reading of *Martin* that finds immunity in a state legislature's general grant to its agency of authority to conduct its affairs is incorrect. As we will explain, a state may express its will as it prefers, but insulation of its instruments from the Sherman Act must be fairly signaled.

II. Under Title 46 a board of five commissioners is charged to "represent the public interest in providing hospital and medical care in the district." La. Rev. Stat. § 46:1054(A)(1). It must "make, alter, amend, and promulgate rules and regulations governing the conduct of the hospital." *Id.* § 46:1055(A)(3). The commission is specifically authorized to "contract with or engage in a joint venture with a person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service." *Id.* § 45:1077. The Louisiana Legislature found that the hospital service districts had been competitively disadvantaged by the ability of private competitors to offer integrated health services. The disadvantages included the inability to discuss its business strategy in private and to enter into various business forms prevalent in the market, such as joint ventures. The Legislature sought to end both of these handicaps. *See id.* § 1071. The legislation directs that it is to be construed liberally to cure competitive disadvantages. *See id.* § 46:1071.

III. The Sherman Act prohibits contract combinations and conspiracies in restraint of trade. Nothing on its face qualifies its reach to states or shirks from such a regulatory bite. Nor does the statute expressly regulate states. In *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), the Supreme Court found that Congress had not made clear its intent to intrude on the sovereign powers of the states by subjecting their decisions to the constraints of the federal antitrust laws.

The doctrine of clear statement is vital to the concreteness of federalism - to the translation of principle to result in judicial decisionmaking, an observation made palpable by its wider use in the half century since *Parker*. Strictly speaking, then, *Parker* immunity is an inapt description, for its parentage differs from the qualified and absolute immunities of public officials. It does however function in certain important respects much like an immunity. Like other immunities, *Parker* issues can often be resolved at an early stage of the litigation. As Professors Areeda and Hovenkamp note, "State authorization is generally interpreted by an objective test that looks at the language of the statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions." I Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 222b (1997). It ordinarily produces a legal conclusion reviewed de novo. *See, e.g., Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1384 (11th Cir. 1993).

While thus a convenient shorthand, "*Parker* immunity" is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation. The price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles. Eleventh Amendment immunity, for example, is arguably a second source of protection for states from the federal antitrust laws. Yet this does not mean that *Parker* immunity for state creatures follows the Eleventh

Amendment, which in fact is far stingier in protecting instruments of local government. That said, while its limits are yet uncertain, the *Parker* doctrine is well developed and is quickly stated.

The Sherman Act does not reach states. Creatures of states, organized to provide local government, such as hospital districts and municipalities, are not sovereign states and are not necessarily beyond the reach of federal antitrust laws. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985). States, however, exercise their sovereign power in creating local entities for local government. As an incident of sovereignty, a state may govern directly or through its creatures, clothing them with the attributes and authority it chooses, including, if it desires, insulation from the Sherman Act. The Supreme Court addressed how a state accomplishes this in *Hallie*, insisting that states express their sovereign will regarding their role in the free market. The Court explained, "The State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." *Id.* at 39. Rather, a local entity seeking protection from the federal antitrust laws must prove "a state policy to displace competition." *Id.*

The correlative principle, and it is at the heart of this case, is that the deference due states as sovereigns resists any insistence upon a particular formula or expression, so long as it is clear from the nature of the policy articulated that the state contemplates such a displacement of competition. *Hallie* illustrates the point. The conduct at issue was refusing to supply sewage treatment facilities outside city limits unless the outsiders agreed to be annexed to the city. *See id.* at 41. The state statute made no explicit reference to displacing competition. It was much more than a naked grant of authority to contract, however, explicitly authorizing the city to determine which areas to serve.

Similarly, in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct.

1344 (1991), the Supreme Court found the City immune from a charge that it had regulated billboards in an anticompetitive way. "The very purpose of zoning regulation," the Court reasoned, "is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.* at 373.

The *Omni* Court declined to expound a clearer test for separating sufficient authorizations from insufficient ones. *See id.* at 372. *Hallie* clarified the "foreseeable result" test. The Court stated, "We think it is clear that anticompetitive effects logically would result from this broad authority to regulate." 471 U.S. at 42. The Court favorably cited its emphasis in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978), that the statute inherently "displaced unfettered business freedom." *Hallie*, 471 U.S. at 42. Thus arises a distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do.

IV. Applying this distinction here is straightforward. The Louisiana statute did not subject St. Luke's or any other businesses to the authority of the hospital service district. It merely added to the hospital service district's list of available powers, by enabling it to form joint ventures and conduct closed meetings. Not all joint ventures are anticompetitive. Thus, it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct.

It is urged that Louisiana by statute granted to the hospital district power to compete and explicitly cloaked it with antitrust immunity. The argument is that the relevant statutes do more than authorize the formation of joint ventures; that joint ventures are authorized with "any person, corporation, partnership, or group of persons," to "sell any

hospital health service," and that the statutes give this power "notwithstanding any other law to the contrary." La. Rev. Stat. § 46:1077. The argument continues that a strict textual reading places the Sherman Act within "any other law to the contrary." It reminds that § 46:1071 explicitly instructs that we are to construe the provisions "liberally" to promote the goal of allowing "a hospital service district to compete effectively and equally."

As we read the statute, the word "equally" qualifies "effectively," making clear that the statute's purpose is to level the playing field but no more. In § 1077, leveling the playing field is tantamount to allowing the hospital service district to form joint ventures just as other corporations can, not to allowing formation of joint ventures that with any other lineage would be anticompetitive. The same is true in providing exception to open meeting laws to discuss market strategies. In context, the reference to any other law responds to Louisiana's general restrictions on the activities of its public corporations. These are not the signals of insulation. They tell us the opposite.

This is the approach the Ninth Circuit took in *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). Lancaster rejected a claim of antitrust immunity, observing that "when there are abundant indications that a state's policy is to support competition, a subordinate state entity must do more than merely produce an authorization to 'do business' to show that the state's policy is to displace competition." *Id.* at 403.

Nor is it inconsistent with *Coastal Neuro-Psychiatric Associates v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340 (4th Cir. 1986), or *Federal Trade Commission v. Hospital Board of Directors*, 38 F.3d 1184 (11th Cir. 1994). The Fourth Circuit case involved a statute, N.C. Gen. Stat. § 131E-85(a), giving hospitals the power to determine which physicians may practice in them. *See* 795 F.2d at 341. The court found that the Hospital had immunity from antitrust

claims in refusing to allow some physicians to use its equipment. Indeed the result was compelled by *Hallie*'s holding that the right to select districts to serve entailed the right not to serve a particular district.

The Eleventh Circuit's decision lies closer to the margin. In defining the foreseeability test, the court held "that the anticompetitive conduct [need only] be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." 38 F.3d at 1190-91. The court's application of its foreseeability test, however, is broadly consistent with the result here. In finding antitrust immunity, the court emphasized that when the legislature authorized a hospital to acquire other hospitals, it already knew that the hospital was a monopoly. *See id.* at 1192. That is the polar opposite of this case, in which the state sought to eliminate a competitive disadvantage suffered by the public hospital and instead establish a market in which the hospital could compete on equal terms. The Eleventh Circuit, though, loses much of its persuasive force by skating close to an overly lax view of the necessity of ~~expressed~~ legislative will. This is so because implementing federalism here produces a rule of construction with two sides - a path to be traversed because federalism is disserved by straying off in either direction.

First, courts will not police states to insist that its legislatures use words federally dictated. We will find a purpose to insulate local government when language and context fairly locate a state policy to displace competition. Second - the other side - is that courts will not infer such a policy to displace competition from naked grants of authority. These are the enabling statutes by which myriad instruments of local government across the country gain basic corporate powers. To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an

instrument of local government with power the state did not intend to grant. The immediate practical effect would be the extension of the *Parker* principle downward, contrary to the teaching that local instruments of government are subject to the Sherman Act.

V. In *Martin*, we confronted a statutory grant of authority to a hospital board. That entity also operated under a certificate of necessity by which the State of Mississippi expressed its intent that its creature be a sole supplier of a medical service. The district court here read *Martin* to find *Parker* immunity from the enabling statute alone - without adding the certificate of necessity to the mix. That reading, as we have explained, is no longer valid, if it ever was. *Martin* read at its best drew upon the complete context of the legislation, including the role of a certificate of necessity. So read, its result could be reached by the decisional path we mark today, albeit by a journey at its edge.

REVERSED AND REMANDED.

SURGICAL CARE CENTER OF HAMMOND, L.C., d/b/a St. Luke's SurgiCenter, Plaintiff-Appellant,

versus

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, d/b/a North Oaks Medical Center, and QUORUM HEALTH RESOURCES, INC., Defendants-Appellees.

No. 97-30887

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

August 27, 1998

COUNSEL: For SURGICAL CARE CENTER OF HAMMOND, L.C., Plaintiff - Appellant: Donna Guinn Klein, Craig Lewis Caesar, McGlinchey, Stafford & Lang, New Orleans, LA.

For HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, QUORUM HEALTH RESOURCES, INCOPORATED, Defendants - Appellees: Robert S. Rooth, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, LA. L. Kenneth Krogstad, Wilbur Anthony Toups, III, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, LA. Daniel M. Mulholland, III, Horty Springer & Mattern, Pittsburgh, PA. Susan M. Lapenta, Horty, Springer & Mattern, Pittsburgh, PA.

Surgical Care Center of Hammond ("St. Luke's") sued Hospital Service District No. 1 of Tangipahoa Parish ("North Oaks") and Quorum Health Resources, Inc. ("Quorum"), under the Sherman Act, 15 U.S.C. § 2, charging various anticompetitive practices. The district court found that North

Oaks and Quorum were entitled to state action immunity from the antitrust laws and dismissed the complaint. We affirm.

I. St. Luke's is an outpatient surgery center in Hammond, Louisiana, that opened for business in 1996. North Oaks, a hospital service district created pursuant to Louisiana statute, is a neighbor of St. Luke's. North Oaks's hospital is located about a quarter mile from St. Luke's and is managed by Quorum, a private, for-profit hospital management firm. In addition to its acute care services, North Oaks offers both inpatient and outpatient surgery.

In 1997 St. Luke's filed the instant suit, alleging that North Oaks enjoyed monopoly power and was conspiring with Quorum to engage in unlawful anticompetitive practices aimed at driving St. Luke's from the market. St. Luke's claimed that North Oaks exercised monopoly power in the market for acute care services and surgical care and was seeking to attain monopoly power in the outpatient surgical care submarket. St. Luke's alleged violations of the Sherman Act, the Louisiana Monopolies Law, La. Rev. Stat. § 51:123, and the Louisiana Unfair Trade Practice and Consumer Protection Law, La. Rev. Stat. § 51:1405, 1409.

Specifically, St. Luke's charged that North Oaks, by leveraging its power in the acute care market and inpatient surgical care submarket, was pressuring managed care plans to sign exclusive contracts. St. Luke's characterized these deals as unlawful tying arrangements that stifled competition in the outpatient surgical care submarket.[1]

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[1] St. Luke's alleged other unlawful trade practices, including North Oaks's refusal to enter into an emergency blood type-and-cross match agreement, its refusal to enter into a standard patient transfer agreement, its attempt to intimidate North Oaks personnel from working at St. Luke's, its refusal to allow nurses from St. Luke's to attend training courses at North Oaks, its attempt to form a joint alliance with an independent physician association to negotiate all contract rates and terms with health care insurers, its purchase and funding of family

The district court granted North Oaks and Quorum's motion to dismiss, concluding that both were insulated from antitrust liability under the state action doctrine. It then dismissed St. Luke's state law claims for want of jurisdiction.

II.

A. We review de novo the dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996). We must construe all allegations in the complaint favorably to the pleader and accept as true all well-pleaded facts. *Word of Faith World Outreach Ctr. Church v. Sawyer*, 90 F.3d 118, 121 (5th Cir. 1996).

B. The Supreme Court first recognized state action immunity to antitrust liability in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), holding that a state agricultural program did not violate the Sherman Act, even though the program restricted competition. The Court premised its holding on principles of federalism and state sovereignty, concluding: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. The Sherman Act, the Court reasoned, targeted private restraints of trade rather than restraints imposed by state legislatures. *Id.*

Four decades later, the Court refined the state action doctrine in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985). There, the Court expanded the state action doctrine to include acts by political subdivisions that stem from state authority. Although subdivisions, because they are not sovereign, are not

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practices in hopes of channeling their patients to North Oaks, and its attempt to undermine the practices of two St. Luke's doctors. In its brief, however, St. Luke's focuses on the exclusive contracts as the most egregious of North Oaks's alleged anticompetitive practices.

automatically immune, they nonetheless can claim immunity when they "demonstrate that [they are] engaging in the challenged activity pursuant to a clearly expressed state policy" to displace competition. *Id.* at 40. The Court held that the legislature need not state explicitly, in the statute or legislative history, its intention or expectation that the delegated action have anticompetitive effects. Instead, a municipality is entitled to *Parker* immunity when the anticompetitive action is the "foreseeable result" of the legislation. *Id.* at 42. In other words, we ask whether "the legislature contemplated the kind of action complained of." *Id.* at 44 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)).[2]

We construed *Parker* immunity in *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996), a case arising under strikingly similar facts. In *Martin*, we concluded that a hospital district was entitled to antitrust immunity when it entered into an exclusive contract with a doctor to operate its facility for end stage renal disease ("ESRD"). The plaintiff, another doctor, complained that the exclusive contract barred him from treating his own patients in the hospital facility. The hospital district pointed to the Mississippi statute authorizing it to enter exclusive contracts and requiring a certificate of need prior to establishing an ESRD facility. We agreed that, based on this statute, the Mississippi legislature "clearly contemplated anticompetitive conduct." *Id.* at 1399. Accordingly, the hospital district was entitled to *Parker* immunity.

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[2] The Court reaffirmed the *Town of Hallie* test in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-73, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), where it observed:

> We have rejected the contention that [the clear articulation] requirement can be met only if the delegating statute explicitly permits the displacement of competition. It is enough, we have held, if suppression of competition is the "foreseeable result" of what the statute authorizes.

III. The instant case centers on a Louisiana statute, La. Rev. Stat. § 46:1051 et seq., which authorizes the creation, and specifies the powers and duties, of hospital districts. St. Luke's argues that while the statute entitles hospital districts to enter into contracts, the Louisiana legislature did not authorize or foresee the extent and magnitude of the anticompetitive conduct in which North Oaks and Quorum allegedly engaged. North Oaks and Quorum dispute this reading of the statute and argue that *Martin* controls this case. Because North Oaks is a political subdivision of the state of Louisiana, *See* La. Rev. Stat. § 46: 1064(a), it is entitled to *Parker* immunity if its anticompetitive conduct is the foreseeable result of the statutory scheme.

A. We begin with the statutory language. La. Rev. Stat. § 46:1077 provides that a hospital service district "may contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service." This broad statutory language parallels the language we deemed sufficient to confer immunity in *Martin*:

> The [Mississippi] statute clearly, affirmatively and articulately empowers the hospital to contract with any individual for the providing of services by or to the hospital regarding any facet of the operation of the hospital or any division or department thereof, or any related activity. It is clearly a foreseeable result of what the statute authorizes that a hospital would enter an exclusive contract with an individual physician to supervise and perform the critical functions of the ESRD units.

Id. at 1400.[3] Following *Martin*, which linked (1) the power to contract with (2) the foreseeability of a hospital entering

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[3] The Mississippi statute provided that a hospital may: contract by way of lease . . . or otherwise, with any agency, department or other

into exclusive contracts, we hold that the Louisiana hospital statute similarly contemplates that a hospital service district might enter into exclusive contracts with health care providers.

B. Buttressing our conclusion is the plain language of La. Rev. Stat. § 46:1071, which sets forth the legislative findings and purpose. (No comparable provision appeared in the Mississippi statute, which makes *Parker* immunity even more appropriate here.) This section, which appears under the subpart heading "ENHANCED ABILITY TO COMPETE," provides in its entirety:

> The legislature hereby finds that the market for hospital and health care services is becoming increasingly competitive. The legislature finds that the hospital and other health care providers are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public. The legislature finds that this increasing competition is forcing hospitals and other

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office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the construction, management, funding or operation of the community hospital or any department or division thereof, or any related activity, including, without limitation, shared management expertise or employee insurance and retirement programs, and to terminate said contracts when deemed in the best interests of the community hospital.

MISS. CODE ANN. § 41-13-35(5)(g). While the Mississippi statute is broader in that it is not confined to "hospital health services," the anticompetitive practices alleged in the instant case concern the provision or promotion of health services, so this distinction is not implicated here. Moreover, the Louisiana statute defines "hospital health services" rather broadly. *See* La. Rev. Stat. § 46:1072(1) ("'Hospital health services'. . . . means but is not limited to any clinical, diagnostic, or rehabilitation service and any administrative, managerial, or operational service incident thereto.").

> health care providers to develop market strategies and strategic plans to effectively compete. The legislature further finds that hospital service districts are presently at a competitive disadvantage. The legislature hereby declares that the purpose of R.S. 46:1071 through 1076 is to enhance the ability of a hospital service district to compete effectively and equally in the market for health care services. Towards this end, the provisions of R.S. 46:1071 through 1076 shall be construed liberally.

La. Rev. Stat. § 46:1071 (emphasis added). Given that the *Martin* court concluded that anticompetitive activity was foreseeable even in the absence of a legislative finding that hospitals were competitively disadvantaged, the Louisiana statute presents a far stronger case for foreseeability.

C. St. Luke's seeks to distinguish *Martin* on the ground that here, the hospital has signed exclusive contracts with health care plans, whereas in *Martin*, the hospital signed exclusive contracts with individual providers. We agree with the district court that St. Luke's has not shown that this distinction is legally relevant. We must ask what conduct is foreseeable under the statute, and La. Rev. Stat. § 46:1077 provides that a hospital "may contract . . . with any person, corporation, partnership, or group of persons." This language belies St. Luke's distinction between plans and providers.

Moreover, nothing in *Martin* suggests that the holding was contingent on this distinction. Although exclusive contracts with health care plans may produce greater anticompetitive effects, the key issue, for purposes of *Parker* immunity, is not the magnitude of the effect but rather whether the effect was contemplated by the legislature. *Parker*'s focus is on federalism, not economics: It commands judicial deference to regulatory schemes enacted by state

legislatures, notwithstanding a court's views on the economic wisdom of the challenged regulation.[4]

The Fourth Circuit considered a similar antitrust challenge in *Coastal Neuro-Psychiatric Assoc., P.A. v. Onslow Mem'l Hosp.*, 795 F.2d 340 (4th Cir. 1986). There, a physicians' association argued that a county hospital had violated the Sherman Act by entering into exclusive contracts with radiologists. The court held that the hospital was entitled to *Parker* immunity because the North Carolina statute contemplated anticompetitive conduct in allowing hospitals to decide which physicians could practice in them. *Id.* at 341-42. The court noted that restricting qualified doctors from practicing at the hospital "may or may not be a salutary result. It is clear, however, from *Town of Hallie* that the choice is that of North Carolina and its local hospital boards of governance." *Id.* at 342.

Several district courts have granted hospital districts *Parker* immunity based on the Louisiana statute. *See Willis-Knighton Med. Ctr. v. City of Bossier*, 1997 U.S. Dist. LEXIS 20920, *21-*22, No. 96-2617 (W.D. La. Oct. 15, 1997) (applying *Martin* and concluding that "the delegation of contractual authority, standing alone, [is] enough to immunize the municipal hospital from any antitrust liability that might otherwise arise from executing an exclusive

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[4] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 212.1f, at 146-47 (Supp. 1997):

> The governing principle in this area has been federalism rather than economic rationality . . . . The Court's view of federalism has left enormous discretion to the states to displace competition. As long as a state announces its policy to displace the antitrust laws with adequate clarity and actively supervises the results, *Parker* allows it to do whatever it pleases, no matter how anticompetitive the consequences.
>
> The active state supervision requirement applies only to private parties; it is not implicated in the instant case. *See Town of Hallie*, 471 U.S. at 38; *Martin*, 86 F.3d at 1397-98.

services contract"), appeal pending; *Fremaux v. Board of Comm'rs*, 1997 U.S. Dist. LEXIS 4098, *8-*10, No. 96-1225 (E.D. La. Mar. 26, 1997) (applying *Martin* and concluding that hospital's entering into an exclusive contract was foreseeable). In two district court cases from Florida, both of which St. Luke's says were wrongly decided, the courts construed *Parker* broadly and immunized a broad swath of anticompetitive conduct by hospitals. *See Central Fla. Clinic v. Citrus County Hosp. Bd.*, 738 F. Supp. 459 (M.D. Fla.), *aff'd*, 888 F.2d 1396 (11th Cir. 1989) (unpublished); *Hospital Dev. & Serv. Corp. v. North Broward Hosp. Dist.*, 619 F. Supp. 535 (S.D. Fla. 1985).

D. In sum, we conclude that the appellees are entitled to *Parker* immunity. The exclusive nature of the contracts was reasonably foreseeable by the Louisiana legislature. As to the other alleged unlawful trade practices, we agree with the district court that while North Oaks may have engaged in "cutthroat" and "hardball" business practices by trying to lure patients to North Oaks, it is conduct that is a reasonably foreseeable result of the Louisiana statute.

IV. St. Luke's argues that even if North Oaks is entitled to *Parker* immunity, Quorum - because it is a private actor - is not. We disagree. La. Rev. Stat. § 46:1055(B) provides that hospital service districts "may enter into a special services agreement with any person, including . . . a hospital management firm . . . to manage, operate, and administer a hospital or hospitals, or any part thereof, under the control of the commission for the benefit of the hospital's service district." Because North Oaks's agreement with Quorum is expressly authorized by the statute, and because Quorum operates the hospital as an agent and for the benefit of the

service district, Quorum is protected by North Oaks's *Parker* immunity.[5]

AFFIRMED.

CONCUR: KING, Circuit Judge, specially concurring:

Although I am troubled by our opinion in *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996), I believe it controls the outcome here, and I therefore concur in Judge Smith's opinion for the panel.

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[5] Although St. Luke's hints in its brief that Quorum may have economic interests independent of North Oaks's, it failed to raise this argument before the district court.

SURGICAL CARE CENTER OF HAMMOND, L.C. d/b/a ST. LUKE'S SURGICENTER

VERSUS

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH d/b/a NORTH OAKS MEDICAL CENTER, ET AL.

CIVIL ACTION NO. 97-1840 SECTION "D" (3)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

August 8, 1997

COUNSEL: For SURGICAL CARE CENTER OF HAMMOND, L.C. d/b/a St. Luke's Surgicenter, plaintiff: Donna Guinn Klein, Craig Lewis Caesar, Edward L. Fenasci, McGlinchey, Stafford & Lang, New Orleans, LA.

For HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, - d/b/a North Oaks Medical Center, defendant: Robert Stephen Rooth, George Phillip Shuler, III, Wilbur Anthony Toups, III, Gina M. Venezia, Chaffe, McCall, Phillips, Toler & Sarpy, LLP, New Orleans, LA. Dickie W. Patterson, Dickie Patterson, Attorney at Law, Hammond, LA. Daniel M. Mulholland, III, Susan M. Lapenta, Horty, Springer & Mattern, PC, Pittsburgh, PA. For QUORUM HEALTH RESOURCES, INC., defendant: Robert Stephen Rooth, (See above), George Phillip Shuler, III, (See above), Wilbur Anthony Toups, III, (See above), Gina M. Venezia, (See above). Daniel M. Mulholland, III, (See above), Susan M. Lapenta, (See above).

The court has under advisement the Motion to Dismiss Pursuant to Federal Rule 12(b)(1) or in the alternative,

Federal Rule 12(b)(6), filed by defendants herein, North Oaks Medical Center ("North Oaks") and Quorum Health Resources, Inc. ("Quorum"). Plaintiff, St. Luke's Surgicenter ("St. Luke's") opposes the motion. The motion is before the court on briefs without oral argument.

FACTUAL BACKGROUND

This action was commenced on June 10, 1997, when St. Luke's sought temporary and permanent injunctive relief restraining North Oaks from operating under any exclusive contract with any managed health care insurer or group. St. Luke's, which opened its doors in 1996, is a free-standing outpatient surgical facility located in Hammond, Louisiana, the same area served by the Louisiana State Hospital District's North Oaks facility. St. Luke's lies approximately a quarter of a mile away from North Oaks, the largest of three acute care hospitals in the service area. North Oaks provides inpatient and outpatient surgery and acute care services. It is managed by Quorum and is a political subdivision of the state of Louisiana. La. Rev. Stat. §§ 46:1064, 46:1072(a).

In its complaint, St. Luke's alleges that defendants have engaged in anticompetitive conduct and unfair trade practices, which St. Luke's claims has affected "Plaintiff's ability to compete in the market for outpatient surgical care in the . . . service area." Complaint, para. 1. St. Luke's specifically takes issue with exclusive contracts entered into between North Oaks and five of the seven largest managed care plans in their market, which they characterize as an illegal tying arrangement that is per se violative of antitrust laws. Complaint, para. 38. St. Luke's has also alleged that defendants have engaged in other unfair trade practices, such as refusing to enter into an emergency blood type-and-cross match agreement; refusing to enter into a standard patient transfer agreement; attempting to intimidate medical personnel at North Oaks to prevent them from performing procedures and seeking employment at St. Luke's; refusing

to allow St. Luke's nursing personnel to attend training courses at the hospital; attempting to form a joint alliance with an independent physician association to negotiate all contract rates and terms with health care insurers; purchasing and funding family practices in order to channel their patients to North Oaks; and attempting to undermine the practices of two St. Luke's physician-investors. Complaint, paras. 18-28.

In a status conference held on July 18, 1997, the court denied St. Luke's Motion for Temporary Restraining Order. Thereafter, the parties submitted a proposed discovery schedule, which was accepted by the court. Pursuant to that schedule, defendants filed the instant Motion to Dismiss, and related pleadings were completed on July 16, 1997, when the court took the matter under advisement.

LEGAL ANALYSIS

1. Standard of Review

In the case at bar, defendants have moved for dismissal, basing their arguments in part on affidavits and exhibits beyond the scope of the plaintiff's complaint, for example, those included with plaintiff's motion for temporary restraining order. Generally speaking, when a party moves for dismissal for failure to state a claim under 12(b)(6) and invokes material beyond the "four corners" of the complaint, the court is required to convert the Rule 12(b)(6) motion into a motion for summary judgment under Rule 56.

However, the Fifth Circuit has recognized that when a district court's decision is not based on any matter that is extrinsic to the complaint, the motion is properly considered one under 12(b)(6), and should not be converted to a motion for summary judgment. *See Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993). Because the matter before the court can be disposed of without reference to materials raised outside the pleadings, the court opts to exclude such extrinsic material from its consideration, and

thus declines to convert this motion to one for summary judgment.

Accordingly, the plaintiff bears the burden in this case of alleging sufficient facts that, if true, justify relief. While defendants' burden in a motion to dismiss is high, and plaintiff's claims must be interpreted in the light most favorable to it, "conlcusory allegations or legal conclusions masquerading as facts [do] not suffice to prevent a motion to dismiss." *Id.* at 284 (citations omitted).

2. Sovereign immunity of North Oaks from federal antitrust law.

In seeking a dismissal, North Oaks has raised the affirmative defense of sovereign immunity from the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, plaintiff's main ground for relief.[6] In making its argument, North Oaks points to the Louisiana Hospital Service District Law, La. Rev. Stat. 46:1051 et seq., which establishes the hospital service districts as political subdivisions of the State of Louisiana. La. Rev. Stat. 46:1064(A). *See also Bertrand v. Sandoz*, 260 La. 239, 255 So. 2d 754, 758 (La. 1971). Because the statutory scheme specifically authorizes the hospital service districts to enter into management contracts with other entities, North Oaks' relationship with Quorum has no effect on its status as a political subdivision of the state.[7]

The Fifth Circuit has previously addressed the issue of "whether a hospital, owned and operated by a municipality

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[6] Plaintiff has also complained of violations of the Louisiana Monopolies Law, La. Rev. Stat. 51:123 et seq., and the Louisiana Unfair Trade Practices Act, La. Rev. Stat. 51:1405.

[7] The commission may enter into a special services agreement with a hospital management firm or hospitals to manage, operate, and administer a hospital or hospitals, or any part thereof, under the control of the commission for the benefit of the hospital service district. La. Rev. Stat. 46:1055(B).

and a state subdivision hospital district, and the hospital's board of trustees, are immune from an antitrust claim under the *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943) state action doctrine." *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1392-93 (5th Cir. 1996). The Fifth Circuit has held that they are. *Id.* Thus, the task before this court is to determine whether the factors present in *Martin* that warranted the extension of state action immunity to Memorial Hospital at Gulfport obtain in the case before it.

A. *Parker* and its progeny

In *Parker* v. *Brown*, the Supreme Court, resting upon federalist principles, confirmed that states which engaged in anti-competitive regulation were entitled to sovereign immunity from federal antitrust laws. In large part, the Court's rationale was based upon the notion that "in a dual system of government, an unexpressed intent to nullify a state's control over its officers and agents is not lightly to be attributed to Congress," coupled with the fact that the Sherman Act's legislative history expressed no such intent. *Parker*, 317 U.S. at 351, 63 S. Ct. at 313. The ruling was later extended to immunize certain anticompetitive activity by political subdivisions, cities, and counties. However, because subdivisions of states are not sovereign, their entitlement to the immunity is not automatic. Rather, the immunity extended to them only when their anticompetitive activity was undertaken pursuant to a clearly articulated and affirmatively expressed state policy, under the active supervision of the state. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S. Ct. 1123, 1135, 55 L. Ed. 2d 364 (1978). Subsequently, the Court waived the "active supervision of the state" requirement when the actor is a municipality, noting (while not deciding that issue) that state supervision should also not be required for the acts of state agencies. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46, 105 S. Ct. 1713, 1720, 85 L. Ed. 2d 24 (1985); *Id.* at n.10.

However, the issue remained as to just how "clearly articulated" a state policy must be before alleged anticompetitive actions made pursuant to it would be considered immune from federal antitrust laws. This question was considered in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). The *Omni* Court found that for a state policy to be considered as "clearly articulating" an anti-competitive goal, "it is enough . . . if the suppression of competition is the 'foreseeable result' of what the statute authorizes." 499 U.S. at 372-73, 111 S. Ct. at 1350.

Recently, the Fifth Circuit applied the precepts of *Parker* and the cases relying on it in a health care/antitrust setting in *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). In that case, the court was presented with a factual scenario in which a hospital, a subdivision of the state under the Mississippi Code, entered into an exclusive contract with a physician for the provision of dialysis treatment. A competing physician filed suit complaining that such exclusive contracts were anticompetitive. Finding that it was reasonably foreseeable that the statute, which gave the hospitals broad contracting powers,[8] could result in this particular type of anticompetitive behavior (i.e., an exclusive contract), the Fifth Circuit recognized that it was entitled to state action immunity. *Id.* at 1399. Accordingly, the question before this court is whether the alleged noncompetitive activities of North Oaks may be fairly considered the foreseeable result of the state policy articulated in the

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[8] The Mississippi statute permitted the hospitals:

> To contract by way of lease . . . or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the . . . operation of the community hospital." Miss. Code Ann. § 41-13-35(g).

Louisiana Hospital Service District Law, La. R. S. 46:1051 et seq.

B. The Louisiana Hospital Service District statutory scheme.

The hospital service districts formed under the provisions of Title 46 are governed by a board of five commissioners ("the commission"). La. Rev. Stat. 46:1053(A). The commission is charged with the duty of "representing the public interest in providing hospital and medical care in the district," La. Rev. Stat. 46:1055(A)(1), and is empowered to "make, alter, amend, and promulgate rules and regulations governing the conduct of the hospital." La. Rev. Stat. 46:1055(A)(3). The districts are also empowered to "contract obligations . . . and to perform any and all acts in its corporate capacity . . . necessary and proper for the carrying out of the objects and purposes for which the hospital service district was created." La. Rev. Stat. 46:1060. Additionally, the commission is specifically authorized to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish or sell any hospital health service."[9] La. Rev. Stat. 46:1077. The legislation includes a finding by the legislature that the hospital service districts have been competitively disadvantaged by the ability of private competitors to enter contractual arrangements to offer integrated health care services. La. Rev. Stat. 46:1071. It therefore licenses the hospital service districts to develop marketing strategies, which they are legally entitled to keep confidential. La. Rev. Stat. 46:1073. Finally, included within the statute is a directive that the related provisions should be construed liberally, in order to cure that competitive disadvantage. La. Rev. Stat. 46:1071.

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[9] "'Hospital health services' means but is not limited to any clinical, diagnostic, or rehabilitation service and any administrative, managerial, or operational service incident thereto." La. Rev. Stat. 46:1072(1).

C. Application to the case at bar.

Given this statutory scheme, and applying the principles of *Parker* and its progeny to the case at bar, the court agrees with North Oaks that it is entitled to immunity under the state action doctrine for its alleged anticompetitive activities. While the Louisiana statute does not include an explicit authorization for hospitals to enter into exclusive agreements, that is not required. The plain language of La. Rev. Stat. 46:1077 authorizes hospitals to contract with any entity to promote the delivery of health services. North Oaks has seen fit to do this by entering into exclusive contracts with health care plans whenever possible. This is an entirely foreseeable result of the Louisiana legislation. In fact, such a move seems designed to attempt to cure the competitive disadvantage suffered by the hospital service districts, the stated goal of the 1995 "Competition" amendments. La. Rev. Stat. 46:1071 et seq.

Plaintiff has attempted to differentiate the instant case from other cases reaching the same result, namely *Martin v. Memorial Hospital at Gulfport* and *Fremaux v. Board of Comm'rs of Hosp. Serv. Dist. No. 3 of Lafourche Parish*, 1997 U.S. Dist. LEXIS 4098, 1997 WL 159483 (E.D. La.), by pointing to the fact that in those cases, the exclusive contracts that were permitted were with health care providers rather than with managed health care plans. The court finds that this distinction is not legally relevant in determining whether North Oaks is entitled to state action immunity. In neither of the cited cases was the court's holding premised on the fact that the exclusive contracts were made with providers. Further, the statute does not limit the contract power to contracts with providers. Finally, the statute itself requires that all provisions relative to competition be liberally construed. La. Rev. Stat. 46:1071.

Plaintiff has also argued that, exclusive contracts aside, North Oaks has engaged in other anticompetitive activity that is not the foreseeable result of the Louisiana Hospital

Service District Law, pointing to North Oaks' (1) refusal to enter a transfer agreement; (2) refusal to enter into an emergency blood type-and-cross match agreement; (3) threatening North Oaks employees who would join St. Luke's staff; (4) refusal to invite St. Luke's nursing staff to attend training classes at North Oak; (5) attempting to destroy the practice of a St. Luke's physician-investor; (6) attempting to purchase physician practices in order to channel patients to North Oak; and (7) attempting to form a physician alliance to negotiate contract rates.

As to the first four of these allegations, decisions not to enter into agreements on St. Luke's terms, to hire and retain certain employees, and to open hospital training courses to certain individuals are clearly in the realm of the routine business decisions concerning day-to-day operations to which the state action immunity should apply. As defendants point out, if the immunity were not available for such daily business decisions necessary to the functioning of the hospital, every decision made by a hospital service district to enter into a contract or to hire, fire, or discipline employees could subject it to an antitrust challenge. Moreover, the statute protects the hospital service district's right "to do and perform any and all acts in its corporate capacity . . . necessary and proper for the carrying out of the objects and purposes for which [it] was created." La. Rev. Stat. 46:1060.

Plaintiff also alleges that North Oaks "specifically targeted the practice of two of the most visible physician-investors of St. Luke's and is systematically attempting to crush their practice through a variety of means," Complaint, para. 28, and has attempted to purchase various physician practices. It seems to the court that the essence of this charge is that North Oaks has attempted to appropriate the patients of certain physicians to itself or to physicians aligned with North Oaks. Independent of the fact that even if true, the allegation that North Oaks attempted to "drive a wedge" between partners in order to achieve this might not justify

relief, attempts to lure patients from another facility to North Oaks, by whatever manner, however "hard ball", are reasonably foreseeable results of the statutory license for hospitals to develop confidential marketing strategies. La. Rev. Stat. 46:1073. Thus, while such behavior, under certain circumstances, may not be the most noble, the court cannot say that it is not a reasonably foreseeable result of Louisiana's statutory scheme, especially as it has been amended to boost the competitive advantages of service district hospitals.

As to plaintiff's allegation that North Oaks attempted to form an alliance to negotiate contracts, the court first observes that since the attempt failed, the court is at a loss to see what anticompetitive activity North Oaks would require immunity from. At any rate, the same logic that mandates a grant of immunity for North Oaks for having entered into exclusive contracts applies to whatever contracts into which North Oaks may have attempted to enter. Moreover, the court reiterates the statutory language permitting the hospital service districts to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish or sell any hospital health service." La. Rev. Stat. 46:1077.

D. Quorum manages North Oaks for the benefit of the hospital service district.

Finally, the court addresses St. Luke's contention that notwithstanding any state action immunity to which North Oaks may be entitled, Quorum, an out-of-state management company, should not be immune. Complaint, para. 40. Aside from this conclusory allegation, nowhere in the complaint does St. Luke's specifically allege that Quorum has any economic interest independent of North Oaks'.[10] Instead,

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[10] In the pleadings, St. Luke's raises the issue of the distinctness of the two entities in the context of its argument that North Oaks and Quorum possess the ability to conspire. This assertion is not the same as

the complaint acknowledges that Quorum is acting pursuant to a management contract with North Oaks. Complaint, para. 4. Moreover, North Oaks' management contract with Quorum is not just the "foreseeable result" of the Hospital Service District law, but explicitly authorized by it. *See supra* note 2, citing La. Rev. Stat. 46:1055(B). Thus, because Quorum has no economic interest independent of North Oaks', but manages and operates the hospital purely for the benefit of the hospital service district, it is clear to the court that Quorum is acting as an agent of North Oaks and the hospital service district and therefore requires no separate grant of immunity.

E. Conclusion

The foregoing discussion illustrates why the defendants are entitled to have the claims against them dismissed. Even accepting as true the charges of anticompetitive behavior of North Oaks made out in St. Luke's complaint, all of the alleged anticompetitive activity is reasonably foreseeable under the Louisiana statutory scheme. Thus, defendants are entitled to state action immunity on those claims. Finally, because plaintiff's remaining claims are brought under state law[11] over which this court has only supplemental jurisdiction, in the absence of a viable federal claim, the court declines to exercise jurisdiction over them. 28 U.S.C. § 1367(c)(3).

Accordingly, having reviewed the complaint, related pleadings, and applicable law;

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suggesting that the two have independent economic interests; in fact, it would suggest just the opposite. However, the court makes no finding on the question of whether these two entities had the ability to conspire, or did conspire, because, finding that defendants are immune from federal antitrust laws, it does not reach the substantive merits of the antitrust claims.

[11] Namely, the Louisiana Monopolies Law, La. Rev. Stat. 51:123 et seq. and the Louisiana Unfair Trade Practices Act, La. Rev. Stat. 51:1405.

IT IS ORDERED that the Motion to Dismiss Pursuant to 12(b)(6) filed by defendants, North Oaks Hospital and Quorum Resources, Inc. should be and is hereby GRANTED dismissing plaintiff's claims.

J. McNamara

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-31199

WILLIS-KNIGHTON MEDICAL CENTER,

Plaintiff-Appellant,

v.

CITY OF BOSSIER CITY; BOSSIER CITY MEDICAL CENTER; CARTER J. BOYD, M.D.; CHARLES A. POWERS, M.D.; and ROBERT CAMPBELL;

Defendants-Appellees,

Appeal from the United States District Court for the Western District of Louisiana
(96-CV-2617)

Per Curiam:*

In light of the court's recent *en banc* decision in *Surgical Care Ctr. v. Hospital Serv. Dist. No. 1*, No. 97-30887, 1999 WL 163430 (5th Cir. Mar. 24, 1999), we find that the appellees in this case are not entitled to *Parker* immunity from antitrust liability. Accordingly, we reverse the district court and remand for proceedings consistent with *Surgical Care*.

REVERSED; REMANDED.

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* Pursuant to the 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

WILLIS-KNIGHTON MEDICAL CENTER

versus

CITY OF BOSSIER CITY,
LOUISIANA, ET AL.

CIVIL ACTION NO. 96-2617

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA,
SHREVEPORT DIVISION

October 9, 1997

COUNSEL: For WILLIS-KNIGHTON MEDICAL CENTER, plaintiff: James Charles McMichael, Jr., Blanchard Walker et al., Shreveport, LA.

For CITY OF BOSSIER CITY, defendant: James D. Hall, City Atty's Office, Bossier City, LA.

For BOSSIER CITY MEDICAL CENTER, CARTER J. BOYD, M.D., CHARLES A. POWERS, M.D., defendants: Bernard S. Johnson, Kenneth Mascagni, Cook Yancey et al, Shreveport, LA. Frank E. Massengale, David Patron, Massengale Debruhl, New Orleans, LA.

For ROBERT CAMPBELL, defendant: Thomas A. Wilson, Jr., Bossier City, LA.

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, having thoroughly reviewed the record and the objections of the parties, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that the defendants' motion to dismiss pursuant to Rule 12(b)(6) is GRANTED; that plaintiff's Sherman Act claims against all defendants are DISMISSED WITH PREJUDICE, and that plaintiff's claims under La. Rev. Stat. 51:1401, et seq., are DISMISSED WITHOUT PREJUDICE.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 9th day of October, 1997.

JUDGE TOM STAGG

WILLIS-KNIGHTON MEDICAL CENTER

versus

CITY OF BOSSIER CITY,
LOUISIANA, ET AL.

CIVIL ACTION NO. 96-2617

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

May 12, 1999

COUNSEL: For WILLIS-KNIGHTON MEDICAL CENTER, plaintiff: James Charles McMichael, Jr., Blanchard Walker et al, Shreveport, LA.

For CITY OF BOSSIER CITY, defendant: James D. Hall, City Atty's Office, Bossier City, LA.

For BOSSIER CITY MEDICAL CENTER, CARTER J. BOYD, M.D., CHARLES A. POWERS, M.D., defendants: Bernard S. Johnson, Kenneth Mascagni, Cook Yancey et al, Shreveport, LA. Frank E. Massengale, David Patron, Massengale Debruhl, New Orleans, LA.

For ROBERT CAMPBELL, defendant: Thomas A. Wilson, Jr., Bossier City, LA.

REPORT AND RECOMMENDATION

Plaintiff Willis-Knighton Medical Center ("Willis-Knighton") instituted this federal antitrust action against defendants the City of Bossier City, Louisiana ("the City"), Bossier Medical Center ("Bossier Medical"), Carter J. Boyd, M.D., Charles Campbell, M.D. and Charles A. Powers, M.D.

Willis-Knighton's complaint alleges that the defendants have engaged in anti-competitive conduct in violation of the Sherman Act, 15 U.S.C. § 1, et seq., as well as the Louisiana Unfair Trade Practices Law, La. Rev. Stat. 51:1401, et seq. Contending that they are immune from antitrust liability for the challenged conduct under the doctrine of "state action" immunity, the defendants have filed a motion to dismiss pursuant to Rule 12(b)(6). For the following reasons, it is recommended that the motion be granted, and that plaintiff's action be dismissed.

BACKGROUND

Factual Allegations

A complaint should survive scrutiny under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). For purposes of the motion, plaintiff's factual allegations must be taken as true and construed in the light most favorable to him. *Green v. State Bar of Texas*, 27 F.3d 1083 (5th Cir. 1994); *Rathborne v. Rathborne*, 683 F.2d 914, 917 n.8 (5th Cir. 1982). It is not required that the complaint outline all the elements of a claim; it is sufficient if inferences may be drawn that these elements exist. *Walker v. South Central Bell*, 904 F.2d 275 (5th Cir. 1990). With this standard in mind, the following factual allegations in the complaint are accepted as true for the purposes of resolving the motion to dismiss.

Defendant Bossier Medical is a hospital in Bossier City which provides primary and secondary inpatient and outpatient care. Since 1966, Bossier Medical has been owned and operated by the City. In July, 1996, plaintiff Willis-Knighton opened WK Bossier Health Center in Bossier City, a hospital which provides basically the same range of medical services as Bossier Medical. The two hospitals compete for the provision of medical services in the Bossier

area.[12] Willis-Knighton contends that the defendants have engaged and continue to engage in acts or practices "specifically designed to financially harm" WK Bossier Health Center. (Complaint at 5). The complaint describes particular examples of anticompetitive conduct, which appear to fall into three basic categories. First, Bossier Medical, with the approval of the City, has allegedly entered into long term and inflated "employment" contracts with the defendant physicians, which require the defendant physicians to refer all their patients to Bossier Medical and preclude them from practicing at WK Bossier Health Center. Bossier Medical, with the approval of the City, has also allegedly entered into inflated practice and asset purchase contracts in order to require exclusive referrals and admissions to Bossier Medical from those physicians. The terms of these contracts are such that Bossier Medical agreed to pay more than the fair market value of the underlying assets. This category of alleged anticompetitive conduct will be generically described as "the contract claims."

Second, Bossier Medical has allegedly adopted emergency room referral policies and protocols designed to circumvent call rotation schedules and to prevent admissions to WK Bossier Health Center and referrals to physicians who have rented offices in the medical offices building at that facility. These policies provide financial penalties for Bossier Medical physicians who admit patients to WK Bossier Health Center or who refer patients to that facility. We will refer to this category as "the physician penalty claims."

Third, Willis-Knighton contends that Bossier Medical has routinely directed patients away from physicians affiliated with WK Bossier Health Center through the dissemination of

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[12] In reciting the facts, we make no attempt to resolve any dispute that exists between the parties as to the size of the relevant market for purposes of analyzing whether there has been an antitrust injury.

false and misleading information. It is also alleged that Bossier Medical, through its administrators and officials of the City, has made false and malicious public statements about the plaintiff and WK Bossier Health Center in order to damage their reputations and business ("the misrepresentation claims").

Claims Asserted and Relief Sought

Based on the foregoing factual allegations, Willis-Knighton asserts that the defendants entered into a contract, combination and conspiracy to restrain trade in the provision of primary and secondary inpatient and outpatient hospital care in Bossier City in violation of Section 1 of the Sherman Act. Plaintiff also alleges that the same conduct by the defendants constitutes a conspiracy to monopolize hospital care in violation of Section 2 of the Sherman Act, as well an unlawful attempted monopolization in violation of that statute. Finally, plaintiff contends that the defendants' conduct rises to the level of unfair or deceptive practices that are in violation of the Louisiana Unfair Trade Practices Law, La. Rev. Stat. 51:1401, et seq. Willis-Knighton seeks injunctive relief against all defendants on the antitrust claims, and monetary damages and injunctive relief on its state law unfair trade practices claims.

ANALYSIS

Municipalities and State Action Immunity

In *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), the United States Supreme Court held that the Sherman Act does not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.*, at 352, 63 S. Ct. at 314. Relying on principles of federalism and state sovereignty, the Supreme Court concluded that the Sherman Act was intended to prohibit private restraints on trade, but not a state's control over its officers and agents in

activities directed by the legislature. *Id.*, at 351, 63 S. Ct. at 313.

Because municipalities are not themselves sovereign, they are not beyond the reach of antitrust laws and have no per se right to invoke state action immunity. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978). Nevertheless, they are entitled to immunity under the state action doctrine when two requirements are satisfied. First, the challenged activity must be undertaken pursuant to a state policy that is "clearly articulated and affirmatively expressed." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39, 105 S. Ct. 1713, 1716, 85 L. Ed. 2d 24 (1985), citing *Lafayette*, 435 U.S. at 410, 98 S. Ct. at 1135. Second, the challenged anticompetitive conduct must be a foreseeable result of the state policy. 471 U.S. at 43-44, 105 S. Ct. at 1719. In order to establish that anticompetitive consequences are foreseeable, the municipality is not required "to point to a specific detailed legislative authorization" for the challenged anticompetitive conduct. *Lafayette*, 435 U.S. at 415, 98 S. Ct. at 1138. Nor must there be an express statement, in a state statute or its legislative history, that the state legislature intends for the delegated action to have anticompetitive effects. *Hallie*, 471 U.S. at 43-44; 105 S. Ct. at 1719. The municipality may prevail with a state action defense simply by establishing that "anticompetitive effects logically would result" from the municipality's exercise of the authority granted by the state. *Id.* at 42; 105 S. Ct. at 1718. The dispositive inquiry is whether the challenged anticompetitive conduct is a "foreseeable result" of the conduct authorized by the state statute. *Id.*; *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 372-73, 111 S. Ct. 1344, 1350, 113 L. Ed. 2d 382 (1991).

The application of the foreseeability test is illustrated by the Supreme Court's decisions in *Hallie* and *Columbia*. In *Hallie*, the municipality was sued under the Sherman Act

because it had refused to provide sewerage treatment services to adjacent unincorporated townships unless a majority of the individuals in an area desiring service voted by referendum election to have their homes annexed by the City. The pertinent state statutes authorized cities to construct sewage systems, to provide service for such systems and to fix by ordinance the limits of any service to be provided in unincorporated areas. The statute further provided that a municipality would be under no obligation to provide service beyond the areas so delineated. Contending that the state action doctrine did not apply, the plaintiffs argued that state statutes which merely authorized provision of sewage services to unincorporated areas could not be reasonably construed as authorizing anticompetitive conduct. They characterized the statutes as "neutral," rather than as a grant of power that reflected an intention to displace competition. The Supreme Court rejected these arguments, finding that the City's anticompetitive conduct "is a foreseeable result of empowering the City to refuse to serve unannexed areas." 471 U.S. at 42; 105 S. Ct. at 1718. Accordingly, the Court held that the municipality was entitled to state action immunity.

In *Columbia*, the municipality adopted an ordinance regulating the size, location and spacing of billboards. The plaintiff, a billboard company new to the area market, alleged that the ordinance suppressed competition by enhancing the market position of another billboard company that had done business in the community for years without competition, and that had longstanding connections with members of city government. The ordinance was enacted pursuant to the authority or a state statute which generally authorized municipalities to regulate the height and size of "buildings and other structures." The Supreme Court concluded that it was foreseeable that municipalities acting under the authority of that ordinance would adopt zoning ordinances that would prevent normal acts of competition,

particularly on the part of new market entrants. Therefore, the antitrust claims against the municipality were dismissed.

Application of the State Action Doctrine in This Case

The Statutory Scheme

In urging their entitlement to state action immunity, the defendants rely on certain statutory provisions concerning hospital service districts. Before attempting to apply the state action doctrine to the facts alleged, it is important to determine which statutory provisions apply to Bossier Medical, an issue on which the parties are not entirely in agreement.

Chapter 10 of Title 46 of the Louisiana Revised Statutes is entitled "Hospital Service Districts." Part I of Chapter 10 (§§ 1051-1068.1) contains general provisions for the creation and operation of hospital service districts, which are described as entities that may be created by the police juries of one or more parishes and that are to be governed by appointed commissioners. As Bossier Medical is a municipal hospital, rather than a hospital created at the parish level, the parties agree that the provisions of §§ 1051-1068.1 do not apply to Bossier Medical.

Part II of Chapter 10, entitled "Competition," is comprised of La. Rev. Stat. 46:1071-1077. Subpart A of Part II, entitled "Enhanced Ability to Compete," is comprised of §§ 1071-1076 (enacted by Acts 1984, No. 322, § 1), and Subpart B, entitled "Contracts or Joint Ventures," is comprised of § 1077 (enacted by Acts 1985, No. 125, § 1). For the purposes of Subpart A (§§ 1071-1076), the definition of hospital service district includes both a hospital formed by a parish government and governed by a commission, as authorized by La. Rev. Stat. 46:1051, and a hospital owned by a city, parish, or other political subdivision of the state. The parties agree that based on the latter part of this

definition, the provisions of §§ 1071-1076 pertain to Bossier Medical. The disagreement is over the applicability of Subpart B, § 1077, which does not separately define the term hospital service district, or incorporate by reference the definition contained in Subpart A. Whether § 1077 applies to Bossier Medical is potentially critical to the outcome of the state action immunity issue, since the defendants rely heavily on the contracting authority granted to hospital service districts by that statute in urging their immunity defense.

Willis-Knighton argues that the § 1072's definition of hospital service districts, which includes hospitals owned by municipalities, is limited by its express terms to the statutes contained "in this Subpart," i.e., Subpart A, §§ 1071-1076. Thus, it contends that § 1077, which is in Subpart B, is not governed by the Subpart A definition, and that the reference to hospital service districts in § 1077 refers only to districts created at the parish level, as authorized by §§ 1051-1068.1. We reject this argument for three reasons. First, it is noteworthy that in 1995, the Louisiana Legislature made minor amendments to § 1072 and § 1077 through the vehicle of one legislative act, Acts 1995, No. 1074, § 1. The inclusion of amendments to both statutes in the same act supports the conclusion that the definitions contained in § 1072 apply to § 1077. Secondly, there is no logical reason why this would not be the case, i.e., why the legislature would enact a statute regarding contracting authority that applies to some hospital service districts, but not others. Third, the Louisiana Attorney General has issued an opinion which states that a municipal hospital is vested with any benefits and powers conferred upon hospital service districts by §§ 1071-1077. Op. Atty. Gen. No. 96-117, March 26, 1996. While a technical amendment of § 1072 for the purpose of clarifying that it applies to both Subparts would remove any ambiguity that does exist as to the issue, we conclude for the reasons stated that § 1077 applies to municipally owned hospitals such as Bossier Medical.

Having determined that §§ 1071-1077 are applicable, we turn to the pertinent provisions of those statutes. Section 1071 provides the following statement of purpose:

The legislature hereby finds that the market for hospital and health care services is becoming increasingly competitive. The legislature finds that the hospital and other health care providers are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public. The legislature finds that this increasing competition is forcing hospitals and other health care providers to develop market strategies and strategic plans to effectively compete. The legislature further finds that hospital service districts are presently at a competitive disadvantage. The legislature hereby declares that the purpose of R.S. 46:1071 through 1076 is to enhance the ability of a hospital service district to compete effectively and equally in the market for health care services. Towards this end, the provisions of R.S. 46:1071 through 1076 shall be construed liberally.

Section 1073 authorizes hospital service districts to "develop marketing strategies for its existing hospital health services or any hospital health service to be provided in the future" and to "develop strategic plans for the development of any future hospital health service or facility." Section 1074 empowers hospital service districts to acquire, construct, lease and maintain medical office buildings and facilities, and Section 1075 authorizes such districts to advertise their services in any medium. Finally, Section 1077 provides, in pertinent part that:

> ...a hospital service district...may contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service.

Antitrust Impact of the Statutory Scheme

The defendants argue that based on the foregoing statutory provisions, it is readily foreseeable that a municipal hospital will engage in the kind of anticompetitive conduct at issue in this case. In particular, they contend that the fact that § 1077 authorizes public hospitals to enter contracts makes it foreseeable that such hospitals will enter exclusive service contracts that have anticompetitive effects. The fact that the statutes also authorize such hospitals to engage in the development of marketing strategies and strategic plans, defendants contend, renders it foreseeable that the hospitals will engage in business strategies that have anticompetitive effects.

In support of their position, the defendants rely heavily on *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), a Sherman Act case in which the Fifth Circuit held that the district court erred by refusing to grant summary judgment in favor of a municipal hospital on the basis of state action immunity. In *Martin*, the challenged anticompetitive conduct involved an exclusive services contract between the hospital and a physician for the operation of the hospital's facility for end stage renal disease. The Fifth Circuit's holding was based in part on a state statute authorizing municipal hospitals "to contract with any individual for the providing of services by or to the community hospital regarding any facet of the operation of the hospital...." *Id.* at 1399. The Court of Appeals concluded that "the hospital's allegedly anticompetitive conduct could have been reasonably anticipated by the Mississippi Legislature when it gave the hospital the power to enter a contract with an individual physician to operate any aspect, division or department of its operation." *Id.* at 1400.

Willis-Knighton counters that the stated purpose of the Louisiana statutory scheme is to place public hospitals on equal footing in the competitive market with privately owned

hospitals, as opposed to giving them special advantages by allowing them to engage in anticompetitive conduct otherwise prohibited by antitrust laws. (Plaintiff's Memorandum in Opposition at 9-10). Plaintiff argues that the rights and powers delegated by §§ 1071-1077 neither expressly nor impliedly reflect a legislative intention to displace unfettered competition, but simply an intention to allow such hospitals to compete in the market in the same manner as private hospitals. Plaintiff also argues that *Martin* is not controlling because the Fifth Circuit's decision in that case was not based solely on a state statute authorizing public hospitals to enter contracts, but also on a separate stature requiring hospitals to obtain a certificate of need before operating an end stage renal disease facility.

Plaintiff's arguments regarding legislative intent in the enactment of §§ 1071-77 - to equalize, rather than to supplant, competition between public and private hospitals - have a certain amount of persuasive appeal. Various provisions in these statutes seem designed to remove impediments to competition on the part of public hospitals by stipulating that certain laws normally applicable to state agencies do not apply to such hospitals. For example, § 1073(B) permits a hospital service district commission to discuss marketing strategies in executive session, thereby removing such sessions from the purview of open meetings laws that otherwise apply to state agencies. Section 1073(C) similarly provides that records prepared on marketing strategy shall not be considered public records subject to disclosure under R.S. 44:1, et seq. Section 1074 provides that the provisions of R.S. 41:1211, et seq., restricting leases of public property, do not prohibit a hospital service district from leasing medical office buildings in the manner authorized therein. Certain provisions of Section 1077, which stipulate that a joint venture between a public hospital and another entity for the provision of health care services shall be deemed a "cooperative endeavor," and that any

contract executed pursuant to the statute shall be presumed to be for the purpose of obtaining a tangible asset, are designed to assure that such activities will not be considered a violation of the restrictions on the use and donation of state property contained in Article VII, Section 14 of the Louisiana Constitution of 1974. These provisions, together with the wording of § 1071, indicate that the primary purpose of these statutes is to level the competitive playing field between public and private hospitals.

Nevertheless, the Supreme Court's decisions in *Hallie* and *Columbia*, as well the Fifth Circuit's recent application of those precedents to a public hospital in *Martin*, do not require the municipality to establish that the primary purpose of the state statutes is displacement of competition. The proper inquiry is whether in light of the conduct authorized by the statute, anticompetitive conduct is foreseeable. *See also Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985) (city's grant of exclusive taxi franchise foreseeable in light of state statutes authorizing regulation of taxi fares and authorizing municipalities to enter contracts for provisions of goods and services to airports); *Helen Brett Enterprises v. New Orleans Metropolitan Convention and Visitors Bureau, Inc.*, 1996 U.S. Dist. LEXIS 9137, 1996 WL 346314 (E.D. La. 1996) (municipal authority's decision to tie advance bookings at convention center to booking of a minimum number of hotel rooms foreseeable in light of statutes authorizing municipal authority to enter contracts and "to make and enforce rules and regulations" regarding operation of convention center).

Martin expressly holds that a legislative delegation of authority to contract renders it foreseeable that a municipal hospital will enter exclusive, anticompetitive contracts. This holding controls the disposition of plaintiff's contract claims, and mandates a determination that those claims are precluded by the immunity doctrine. The physician penalty

claims, which involve emergency room referral policies and procedures, are also a foreseeable consequence of the statutory authorization for public hospitals to engage in marketing and strategic planning (§ 1073). To the extent that Bossier Medical has allegedly prohibited referrals to physicians located at WK Bossier Health Center, such conduct is also a foreseeable consequence of the provisions which authorize public hospitals to operate and lease medical office buildings (§ 1074). Finally, as regards the misrepresentation claims, it is foreseeable that the competitive conduct authorized by the referenced statutes, including the power to advertise in any medium, would result in a public hospital or its officials making statements which criticize a competitor - fairly or unfairly. Thus, to the extent that such conduct has anticompetitive consequences, any antitrust claims based on that conduct are also encompassed by the immunity doctrine.[13]

As noted above, plaintiff argues that *Martin* is distinguishable because the Fifth Circuit relied both on a statute granting public hospitals the authority to enter contracts and a statute which required such hospitals to obtain a certificate of need in order to provide the services in question. Based on the language and tenor of *Martin*, this court concludes that the Court of Appeals viewed each of the referenced statutes as an independent basis for applying state action immunity. In other words, the delegation of contractual authority, standing alone, was enough to immunize the municipal hospital from any antitrust liability that might otherwise arise from executing an exclusive services contract. Furthermore, it is worth noting that neither

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[13] Whether misrepresentations in this context give rise to viable state law tort claims is not considered. Also not considered is the defendants' alternative contention that plaintiff's allegations regarding the alleged misrepresentations do not state an antitrust claim even in the absence of immunity because they are conclusory in nature and do not establish that there was an injury to the relevant market.

of the statutes which supplied the basis for immunity in *Martin* (the statute authorizing the entering of contracts and the statute requiring a certificate of need) appears to have had as its primary purpose the displacement of competition. Nevertheless, the municipality was entitled to immunity because anti-competitive conduct was a natural consequence of the statutory regulation. Application of *Martin*, and the Supreme Court precedent on which it is based, requires the same result in this case.[14]

Applied in this fashion, the scope of foreseeability test is quite broad. It arguably allows a municipality to engage in anticompetitive conduct in any area in which municipalities are authorized by the Legislature to enter contracts, or to otherwise participate as players in the private market.[15]

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[14] In its opposition memorandum, Willis-Knighton asserts that the immunity doctrine does not apply unless the state statutory scheme evidences a "'clearly articulated and affirmatively expressed state policy' to displace competition with regulation or monopoly public service." Plaintiff's Memorandum in Opposition at 4. However, a careful reading of the controlling jurisprudence reflects that what must be "clearly articulated and affirmatively expressed" is a state policy delegating certain authority to municipalities, from which an intention to displace competition is presumed if anticompetitive consequences are a foreseeable result of the statutes or regulations. As the Supreme Court held in *Columbia*, "we have rejected the notion that the [clear articulation] requirement can be met only if the delegating statute explicitly permits displacement of competition. It is enough, we have held, if the suppression of competition is the 'foreseeable result' of what the state authorized." 499 U.S. at 372-73, 111 S. Ct. at 1350.

[15] This is not to say that any legislative delegation of authority to municipalities, no matter how broadly worded, will immunize all municipal actions taken under the authority of that delegation. For example, in *Community Communications Co. v. Boulder*, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982), a state constitutional amendment granting general authority to municipalities to govern their affairs was held insufficient to immunize a municipality's conduct in connection with the regulation of cable television. But when the state statutory scheme expresses a clear policy with regard to an identifiable subject matter (*e.g.*, provision of sewerage treatment services; authority

Conceivably this approach, in some cases, will become a self-fulfilling prophecy, i.e., (1) a municipality's anticompetitive conduct is immune if a grant of statutory authority makes such conduct foreseeable; (2) a municipality can ordinarily be expected to seek any advantages it can obtain from anticompetitive conduct if it knows that it is immune from antitrust liability; and therefore (3) anticompetitive conduct on the part of the municipality is foreseeable. Whether or not the foreseeability test will operate in this fashion in some cases, or whether a market participant exception to the immunity doctrine might eventually be recognized for certain commercial activities, *See generally Helen Brett Enterprises*, 1996 U.S. Dist. LEXIS 9137, 1996 WL 346314 at *4, the current state of the jurisprudence compels a finding that the City and Bossier Medical are entitled to antitrust immunity in this case.

Antitrust Claims Against the Individual Defendants

Plaintiff argues that individual defendants are not entitled to the benefit of state action immunity unless, in addition to making the same showing required of a municipality, they also establish that their conduct was actively supervised by the state. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985). Contending that the physician defendants cannot make such a showing in this case, Willis-Knighton submits that even if its claims against the City and Bossier Medical are precluded by state action immunity, its claims against Drs. Boyd, Campbell and Powers are not.

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to regulate size and placement of structures; operation of public hospital), it is difficult to envision many situations in which the immunity doctrine will not apply. As one commentator has noted, "it would take a fairly extreme situation to find antitrust liability [of a municipality] under *Columbia*, and even then there are doubts." H. Hovenkamp, Federal Antitrust Policy § 20.6, at 687-88 (1994).

The defendants respond that the "active supervision" requirement articulated in Southern Motor Carriers and other cases only applies when the challenged anticompetitive conduct exclusively involves private parties. They contend that when private parties contract with municipalities, or otherwise engage in cooperative conduct with a municipality that is challenged as anticompetitive, the private defendants' entitlement to immunity is judged by the same standard applicable to the municipalities. These arguments have support in the jurisprudence. A private party is entitled to state action immunity, without the necessity of meeting the "active supervision" requirement, when (1) that party was engaged in cooperative conduct with a municipality for which the municipality is immune under the antitrust laws, and (2) the participation of private parties was reasonably contemplated by the state legislature. *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1047-48 (2d Cir. 1986). To hold otherwise would allow plaintiffs to block the protected activities of the municipality by suing the private parties. *Id. See also Helen Brett Enterprises, supra*, 1996 WL 346314 at *6-7. In this case, the statutory scheme expressly contemplates that municipal hospitals will enter contracts with private parties. Since the municipality is immune from antitrust liability in connection with such conduct, immunity is extended to the individual physicians as well.[16]

State Unfair Trade Practices Claims

Given the recommended dismissal of all federal claims at this early stage of the proceedings, and the absence of a basis for diversity jurisdiction, the appropriate disposition of plaintiff's claims under the Louisiana Unfair Trade Practices

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[16] Having reached this conclusion, we have no occasion to address the defendants' separate contention that the physicians are entitled to immunity under the Noerr-Pennington doctrine.

Law, La. Rev. Stat. 51:1401, et seq., is dismissal without prejudice. 28 U.S.C. § 1367(c)(3).

Accordingly, IT IS RECOMMENDED that the defendants' motion to dismiss pursuant to Rule 12(b)(6) be GRANTED; that plaintiff's Sherman Act claims against all defendants be DISMISSED WITH PREJUDICE, and that plaintiff's claims under La. Rev. Stat. 51:1401, et seq., be DISMISSED WITHOUT PREJUDICE.

Objections

Under the provisions of 28 U.S.C. section 636(B)(1)(C), and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from receipt of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. U.S.A.A.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 12th day of May, 1997.

ROY S. PAYNE

UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30487

RALPH ABRAHAM, M.D.;
RANDY W. HEAD, M.D.; and,
RON MORGAN, M.D.;
Plaintiffs-Appellees-Appellants,

v.

RICHLAND PARISH HOSPITAL SERVICE DISTRICT 1-B, D/B/A RICHLAND PARISH MEDICAL CENTER; and DAVID KERVIN;
Defendants-Appellees

AND

ROBERT MADDOX, M.D.; and SPECTRUM EMERGENCY CARE, INC.;
Defendants-Appellants

Appeals from the United States District Court for the Western District of Louisiana

Per Curiam:*

In light of the court's recent *en banc* decision in *Surgical Care Ctr. v. Hospital Serv. Dist. No. 1*, No. 97-30887, 1999 WL 163430 (5th Cir. Mar. 24, 1999), Richland Parish Hospital Service District 1-B and David Kervin are not entitled to *Parker* immunity from antitrust liability. Accordingly, the district court's contrary judgment must be

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* Pursuant to the 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

reversed and remanded for proceedings consistent with *Surgical Care*. Further, the appeal filed by Dr. Robert Maddox and Spectrum Emergency Care, Inc., challenging the district court's denial of immunity to them must be dismissed, as it involves an interlocutory, non-final order.

REVERSED AND REMANDED IN PART; DISMISSED IN PART.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

RALPH ABRAHAM, *ET AL.*	CIVIL ACTION NO. 97-760
Versus	JUDGE DONALD E. WALTER
RICHLAND PARISH HOSPITAL SERVICE DISTRICT I - B, *ET AL.*	MAGISTRATE JUDGE SIMON

JUDGMENT

On September 23, 1997, Magistrate Judge John Simon issued a Report and Recommendation, Docket Sheet item 12, in the above-captioned matter, recommending that (1) defendants Richland Hospital and David Kervin's ("Kervin") Motion to Dismiss be granted and that plaintiffs Ralph Abraham, M.D., Randy W. Head, M.D., and Ron Morgan, M.D.'s (collectively "Plaintiffs") claims against those two defendants be dismissed without prejudice; and (2) that defendants Spectrum Emergency Care ("Spectrum") and Robert Maddox, M.D.'s ("Maddox") Motion to Dismiss be denied.

On March 4, 1997, this Court issued an Order, Docket Sheet item 25, converting the proceedings into a Motion for Summary Judgment and thus allowing the parties to attempt to establish a genuine issue of material fact. Subsequently, Plaintiffs submitted several affidavits and sworn statements, Docket Sheet item 29 & attached Exhibits. Defendants Spectrum and Maddox also submitted a short memorandum of law, Docket Sheet item 30, and in an April 28, 1998, letter to the Court, directed the Court's attention to a recent opinion of the Fifth Circuit Federal Court of Appeals. *Earles*

v. State Board of Certified Public Accountants of Louisiana, 1998 WL 197765 (5th Cir. Apr. 24, 1998). The Court will have this letter and attached case filed into the record.

The Court has reviewed the parties' Objections to the Report and Recommendation and reviewed the supplemental memorandums filed by the parties after the Court's March 4, 1997, Order.

The Court finds that the affidavits and materials submitted by Plaintiffs do not raise a genuine issue of material fact. Further, the *Earles* case cited by Spectrum and Maddox would not alter the Magistrate Judge's analysis in the Report and Recommendation.

Thus, the Court finds that there are no genuine issues of material fact. Further, the Court determines that the Magistrate Judge's analysis and determination is correct under the applicable

As such, IT IS ORDERED that defendants Richland Hospital and Kervin's Motion to Dismiss, be GRANTED and that Plaintiffs' claims against those two defendants be DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that defendants Spectrum and Maddox's Motion to Dismiss be DENIED.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this the 1st day of May, 1998.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

RALPH ABRAHAM, ET AL., Plaintiffs	CIVIL ACTION NO. CV97-0760-M
VERSUS	
RICHLAND PARISH HOSPITAL SERVICE DISTRICT 1-B, ET AL., Defendants	JUDGE WALTER MAGISTRATE JUDGE SIMON

REPORT AND RECOMMENDATION
OF MAGISTRATE JUDGE

Before the Court are two separate motions to dismiss that were filed by the defendants herein that were referred to the undersigned magistrate Judge for report and recommendation in accordance with a standing order of this court. I will recommend that the motion of Richland Hospital and David Kervin be granted and that the motion of Spectrum Emergency Care, Inc., and Robert Maddox be denied.

Facts and Procedural History

This is an action alleging anti-trust violations, filed pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and various state laws, by plaintiffs Ralph Abraham, M.D. ("Abraham"), Randy W. Head, M.D. ("Head") and Ron Morgan, M.D. ("Morgan"), medical doctors (general practitioners) who maintain offices in Mangham, Louisiana. The named defendants are the Richland Parish Hospital Service District 1-B d/b/a Richland.

Medical Center ("Richland Hospital") (a political subdivision of the State of Louisiana which maintains and operates a hospital in Richland Parish, Louisiana), David Kervin ("Kervin") (the administrator of the Richland Hospital), Spectrum Emergency Care, Inc. ("Spectrum") (a foreign corporation, licensed to do business in Louisiana, which contractually maintains and operates emergency rooms in various hospitals in Louisiana and throughout the United States, including Richland Hospital), and Robert Maddox, M.D. ("Maddox") (an emergency room physician employed by Spectrum to work at the Richland Hospital). Plaintiffs allege that defendants conspired to boycott them and to illegally restrain their trade in providing emergency room services.[17] Plaintiffs seek injunctive relief and monetary damages.

Defendants Spectrum and Maddox filed one motion to dismiss for failure to state a claim on which relief can be

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[17] Plaintiffs Abraham and Head allege, specifically, that before April 1996 they provided services for the Richland Hospital pursuant to individual contracts with each physician, in return for which the Richland Hospital guaranteed each physician a monthly income of $8,333.00 and reimbursed the physicians for their office expenses up to $8,000.00 each month. Abraham and Head allege that, in April 1996, Richland Hospital violated its contracts with them by unilaterally stopping payments to them and that, in August 1996, Richland Hospital, without just cause, accelerated the rent that they were paying Richland Hospital for office space. Plaintiffs further alleged that they began receiving complaints from their patients that when the patient checked into the emergency room, Richland Hospital employees and Dr. Maddox made an effort to have those patients select physicians other than plaintiffs. Plaintiffs also contend that Dr. Maddox refused to provide emergency room service for plaintiffs' patients, unnecessarily delayed treatment for plaintiffs' patients, communicated with plaintiff's patients in terms slanderous to plaintiffs' characters and professional reputations, and contacted plaintiff's patients to advise them they should seek medical treatment from physicians other than the plaintiffs. Finally, plaintiffs allege that all the defendants conspired to exclude plaintiffs from examining those patients who seek emergency room treatment at Richland Hospital.

granted and for lack of subject matter jurisdiction (Doc. Item 6), and defendants Richland Hospital and Kervin filed another (Doc. Item 7), to which plaintiffs responded (Doc. Item 10) and defendants Spectrum and Maddox replied (Doc. Item 11).

Defendants' motions to dismiss are now before the court for disposition.

Law and Analysis

Motion to Dismiss

For the purposes of a motion to dismiss, the factual allegations of the complaint must be taken as true, and any ambiguities must be resolved in favor of the pleader. *Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1101 (5th Cir. 1985). A motion to dismiss an action for failure to state a claim admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995). In particular, a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hirras v. National Railroad Passenger Corp.*, 10 F.3d 1142, 1144 (5th Cir. 1994), *vacated on other grounds*, 512 U.S. 1231, 114 S. Ct. 2732, 129 L. Ed. 2d 855 (1994); *Doe*, 753 F.2d at 1102. On a motion to dismiss, it is presumed that general allegations embrace the specific facts that are necessary to support the claim. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 803, 127 L. Ed. 2d 99 (1994), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992).

Richland Hospital and Kervin are Immune From Antitrust Claims

Richland Hospital and Kervin assert the defense of state action immunity from suit under the holding of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 2d 315 (1943).

1. Anti-Trust Law Exemption for States

Under the state action immunity doctrine, also known as the *Parker* doctrine, states are immune from federal antitrust law for sovereign actions. The *Parker* doctrine exempts anti-competitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions pursuant to state policy to displace competition with regulation or monopoly public service. The doctrine is grounded in and derived from principles of federalism and state sovereignty. *Crosby v. Hosp. Authority of Valdosta & Lowndes Cty.*, 93 F.3d 1515, 1521 (11th Cir. 1996), cert. den.,___U.S.___ , 117 S. Ct. 1246, 137 L. Ed. 2d 328 (1997), citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978).

The state action immunity doctrine does not apply directly to a state's political subdivisions because these subdivisions are not themselves sovereign; they do not receive all the federal deference of the States that create them. However, a municipality, state agency or other political subdivision is entitled to state action immunity for actions taken pursuant to a clearly articulated and affirmatively expressed state policy. *Crosby*, 93 F.3d at 1521-22, citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 1720, 85 L. Ed. 2d 24 (1985). To meet the "clear articulation" standard, it is not necessary to have a delegating statute which explicitly permits displacement of competition; it is enough if the suppression of competition is the foreseeable result of what the state authorized. *See also, Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1399 (5th Cir. 1996), citing *City of*

Columbia v. Omni Outdoor Advertising, Inc. ("Omni"), 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

Private parties are entitled to less federal deference than either the State or its political subdivisions. When a private party seeks the protection of state action immunity, it must show that: (1) the challenged trade restraint was clearly articulated and affirmatively expressed as state policy, and (2) the policy was actively supervised by the state. *Crosby*, 93 F.3d at 1522, citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 (1980). The threshold question is whether the activity is *required* by a state acting as sovereign. It is not enough that a private party's anticompetitive conduct was prompted by state action. *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 422-23 (5th Cir. 1976). Moreover, "active state supervision" means more than the mere presence of state involvement or monitoring; the active state supervision prong requires that state officials have and exercise power to review particular anti-competitive acts of private parties and disapprove those that fail to accord with state policy. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 112 S. Ct. 2169, 2177, 119 L. Ed. 2d 410 (1992).

Finally, there is no "conspiracy exception" to *Parker*. *Omni*, 499 U.S. at 374, 111 S. Ct. at 1351. Any action that qualifies as state action is exempt from the operation of the antitrust laws. *Omni*, 499 U.S. at 379, 111 S. Ct. at 135-3.

2. Richland Hospital Is Immune

Under Louisiana Revised Statute § 46:1064(A), hospital service districts are political subdivisions of the state. Therefore, Richland Parish Hospital Service District 1-B is a government entity. In determining whether Richland Hospital has state action immunity in this case, the issue before the court is whether Richland Hospital's actions as

alleged in the complaint were in furtherance of a clearly articulated and affirmatively expressed state policy.

La. Rev. Stat. § 46:1060 provides that hospital service districts are corporations which can perform all acts in their corporate capacity, including the power to incur debts and contract obligations. *See also*, *Fremaux v. Board of Commissioners of Hospital Service District No. 3 of Lafourche*, 1997 WL 159483 (E.D. La., March 26, 1997). La. Rev. Stat. § 46:1077 addresses the contract powers of hospital service districts, stating that the board of commissioners of a hospital service district can contract with any person, corporation, partnership, or group of persons to offer, provide, promote, establish or sell any hospital health service, and creates a presumption that contracts consummated pursuant to Section 1077 are entered into for the purpose of obtaining a tangible benefit and for a public purpose. In *Martin*, 86 F.3d at 1399,[18] the Fifth Circuit held that a similar provision under Mississippi law[19] provided a clear and affirmative articulation of the legislature's intent to exempt the hospital from antitrust liability and concluded that the hospital's alleged anti-competitive activities were reasonably foreseeable by the state legislature. The Fifth

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[18] In *Martin*, 86 F.3d at 1393, a nephrologist brought an antitrust action against a hospital owned and operated by a municipality, a state subdivision hospital district and the hospital's board of trustees, to enjoin the enforcement of the hospital's contract with the medical supervisor (also a nephrologist) of the End Stage Renal Disease facility. The contract, as interpreted by the hospital, permitted only the medical supervisor or his medical practice associate to perform chronic dialysis in the End Stage Renal Disease facility.

[19] In *Martin*, 86 F.3d at 1399, the pertinent Mississippi statute, Miss. Code Ann. § 41-13-35(5)(g) (1972), authorized the board of trustees of a community hospital to contract with any individual for the providing of services by or to the community hospital regarding any facet of the operation of the hospital or any division or department thereof, or any related activity, and to terminate said contracts when deemed in the best interests of the community hospital.

Circuit held that the standards of the *Hallie* and *Omni* cases were met because the statute, which provided authority for the hospital to enter contracts, clearly, affirmatively and articulately empowered the hospital to contract with any individual for the providing of services by or to the hospital regarding any facet of the operation of the hospital or any division or department thereof, or any related activity, and that it was clearly a foreseeable result of what the statute authorized that a hospital would enter into an exclusive contract with a physician to supervise a special unit and perform its critical functions, to obtain the doctor's dedicated services by displacing unfettered professional medical freedom in a manner that prevents normal acts of competition, so as to promote efficiency of health care provision, reduce the hospital's supervisory burden and control its exposure to liability. *Martin*, 86 F.3d at 1400.

The Louisiana statute, La.R.S. 46:1077, is similar to the Mississippi statute reviewed in *Martin*. Section 1077 demonstrates that the Louisiana state legislature authorized hospital service districts to contract with any person, corporation, partnership, or group of persons to offer, provide, promote, establish or sell any hospital health service. A hospital's allegedly anti-competitive conduct could have been reasonably anticipated by the Louisiana legislature when it gave hospitals the power to enter a contract with a corporation to provide any hospital health service. Therefore, as in *Martin*, the Louisiana legislature has provided a clearly articulated and affirmatively expressed intent to exempt hospital service districts from antitrust liability. *Compare*, *Martin*, 86 F.3d at 1400.

The next step is to determine whether the plaintiffs' allegations show that Richland Hospital's actions furthered that policy. The plaintiffs allege that Richland Hospital is a non-profit hospital which is maintained and operated by the Hospital Service District to provide health care services in a variety of areas of medical treatment, including the only emergency room care in the geographic area, to individuals

who reside in Richland Parish and surrounding areas. Plaintiffs further allege that Richland Hospital exclusively contracted with Spectrum to provide medical staff to the Richland Hospital Emergency Room and that pursuant to that contract, Dr. Maddox is a full-time emergency room physician at Richland Hospital.

Accepting plaintiffs' allegations as true for purposes of this motion, Richland Hospital's actions in contracting with Spectrum to provide medical staff furthered the state policy of permitting hospital service districts to establish or sell any hospital health service.[20] Under La.R.S. 46:1077, it is presumed that Richland Hospital's contract with Spectrum was entered into for the purpose of obtaining a tangible benefit and for a public purpose.

Since the allegations of the complaint show that the plaintiffs are complaining of actions of Richland Hospital that were taken pursuant to a "clearly articulated and affirmatively expressed state policy" they show that Richland Hospital is entitled to state action immunity from anti-trust liability for its contract with Spectrum to provide emergency room service. Thus,the complaint fails to state a claim against Richland Hospital upon which relief may be granted.

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[20] Plaintiffs also raise the "market participation exception" to *Parker*, mentioned in dicta by the court in *Omni*, 499 U.S. at 379, 111 S. Ct. at 1353, as a defense to the claims of state action immunity. However, the "market participation exception," also known as the "proprietary interest exception" or the "commercial competitor exception," is only a suggestion and not yet a rule of law. *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312-13 (8th Cir.), *cert. den.*, 502 U.S. 963, 112 S. Ct. 430, 116 L. Ed. 2d 450 (1991); *Limeco, Inc. v. Civ. of Line of Mississippi Dept. of Agriculture & Commerce*, 778 F.2d 1086, 1087 (5th Cir. 1985); *Forest Ambulance Serv., Inc. v. Mercy Ambulance of Richmond, Inc.*, 952 F. Supp. 296, 300-301 (E.D. Va. 1997); *In re Recombinant DNA Technology Patent and Contract Litigation*, 874 F. Supp. 904, 912 (S.D. Ind. 1994).

3. Kervin Is Also Immune

Plaintiffs have made no specific allegations as to Kervin (the Richland Hospital administrator) other than to state that Richland Hospital acted through Kervin. As the hospital administrator, Kervin was part of the hospital's management structure and, as plaintiffs allege, Kervin's actions were performed on behalf of the Richland Hospital. Accepting plaintiffs' allegations as true for purposes of this motion, Kervin was clearly functioning as an agent of the Richland Hospital and his actions should be considered as taken by the hospital.

Since Kervin was acting pursuant to a "clearly articulated and affirmatively expressed state policy," Kervin is entitled to state action immunity on the antitrust claims, and the complaint fails to state a claim against him upon which relief may be granted. *Compare*, *Crosby*, 93 F.3d at 1530-32.

4. State Law Claims Against Richland Hospital & Kervin

Plaintiffs have also asserted various state law claims against Richland Hospital and Kervin under the supplemental jurisdiction of this court. However, this court's resolution of the antitrust claims against Richland Hospital and Kervin makes it proper to dismiss, without prejudice, plaintiffs' state law claims against Richland Hospital and Kervin.

District courts have "supplemental jurisdiction" over claims so related to a federal question "that they form part of the same case or controversy," 28 U.S.C. §1367(a). *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1018-19 (5th Cir.), *cert. den.*, 508 U.S. 956, 113 S. Ct. 2456, 124 L. Ed. 2d 671 (1993); *Whalen v. Carter*, 954 F.2d 1087, 1097 (5th Cir. 1992). However, the district courts may decline to exercise supplemental jurisdiction over a claim under § 1367(a) if the district court has dismissed all claims over which it has original jurisdiction. *Rodriguez*, 980 F.2d

at 1018; *Stephens v. LJ Partners*, 852 F. Supp. 597, 600 (W.D. Tex. 1994); *Holt v. Lockheed Support Systems, Inc.*, 835 F. Supp. 325, 329 (W.D. La. 1993). In deciding whether to exercise supplemental jurisdiction, the court must consider judicial economy, convenience, fairness and comity. *Metropolitan Wholesale Supply, Inc. v. M/V Royal Rainbow*, 12 F.3d 58, 61 (5th Cir. 1994). Since plaintiffs' antitrust claims against Richland Hospital and Kervin should be dismissed, as discussed above, plaintiffs' state law claims against Richland Hospital and Kervin should also be dismissed without prejudice, in the interests of judicial economy and comity.

Therefore, the state law claims filed against Richland Hospital and Kervin should be dismissed with the federal law claim.

Immunity Of Spectrum & Maddox Not Shown By Allegations of Complaint

Defendants Spectrum and Maddox also assert the defense of state action immunity in their motion to dismiss. However, the complaint does not show that either Spectrum or Maddox acted as agents of the Richland Hospital; instead the complaint alleges that Spectrum and Maddox acted as independent contractors employed by Richland Hospital to staff and supervise the emergency room. As private actors seeking immunity, Spectrum and Maddox must show that their challenged trade restraint was clearly articulated and affirmatively expressed as state policy, and that the policy was actively supervised by the state. *Crosby*, 93 F.3d at 1522. The threshold question is whether the activity of Spectrum and Maddox is *required* by a State acting as sovereign. *Litton Systems, Inc.*, 539 F.2d at 422-23.

Accepting plaintiffs' allegations as true for purposes of this motion, Richland Hospital contracted to have Spectrum provide, supervise and pay the hospital's emergency room staff, and that Spectrum then engaged in anti-competitive

practices. As discussed above, the challenged conduct in contracting to be the sole provider of emergency room services was pursuant to a clearly articulated and affirmatively expressed state policy. However, nothing in the law or the pleadings shows that Spectrum and Dr. Maddox were actively supervised by the State; instead, the management of the emergency room appears to have been turned over to Spectrum and Maddox.

Since the complaint does not show active supervision of Spectrum or Maddox by the State (or Richland Hospital), it does not show that they are entitled to state action immunity on the antitrust claims. Therefore, the antitrust claims and the supplemental state claims against those two defendants should not be dismissed and their motion to dismiss should be denied.

Conclusion

Based on the foregoing discussion, IT IS RECOMMENDED that the motion to dismiss for failure to state a claim upon which relief may be granted that was filed by Richland Hospital and David Kervin be GRANTED and that plaintiffs' claims as against those two defendants, only, be DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER RECOMMENDED that the motion to dismiss filed by Spectrum Emergency Care, Inc. and Robert Maddox be DENIED.

Under the provisions of 28 U.S.C. S 636(b)(1)(C) and Fed.R. Civ.Proc. 72(b) , the parties have **ten (10) business days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **ten (10) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing.

Timely objections will be considered by the district judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this day of September 22, 1997.

JOHN F. SIMON
UNITED STATES MAGISTRATE JUDGE

STATUTORY APPENDIX

La. Rev. Stat. 46:1051 Authority to create and alter the boundaries of districts

A. The police juries of parishes are authorized and empowered, upon their own initiative, to form and create one or more hospital service districts within the respective parishes, or with agreement among police juries concerned, to combine two or more parishes into a single hospital service district with such names as the police juries may designate, and, in so doing, police juries may create hospital service districts whose boundaries overlap those of other hospital service districts.

B. The police juries are further authorized and empowered, upon their own initiative, to alter the boundaries of any hospital service district, provided that no such boundary change shall cause an impairment of the obligations of any contract of the hospital service district.

C. Such creation of overlapping hospital service districts or the alteration of the boundaries of any hospital service district prior to July 31, 1968, are hereby expressly validated, ratified and confirmed.

D. The governing authority of Pointe Coupee Parish may rename the Pointe Coupee Parish Hospital Service District Number One as the Pointe Coupee Parish Health Services District Number One; in such case, such district and its commission shall continue to have all powers, duties, functions, and responsibilities as provided in this Chapter for hospital service districts, and their commissions and the parish governing authority shall continue to have all powers, duties, functions, and responsibilities as provided in this Chapter with respect to such district.

E. Notwithstanding the provisions of Subsections A and B of this Section, the governing authority of Ouachita Parish shall not abolish or alter the boundaries of Hospital Service

District No. 1 of the Parish of Ouachita unless the abolition or alteration is approved by two-thirds of the full membership of the board of commissioners of the district and approved by a majority of the voters of the district, as the district existed on January 1, 1997, voting at an election held for the purpose of authorizing such abolition or alteration in accordance with the Louisiana Election Code. The parish governing authority or the board of commissioners may call an election for such purpose after the board of commissioners has voted for such approval as provided in this Subsection.

La. Rev. Stat. 46:1052 Objects of the districts

The objects and purposes of the hospital service districts and the governing bodies created under the provisions of this chapter shall be:

(1) To own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care.

(2) To administer other activities related to rendering care to the sick and injured or in the promotion of health which may be justified by the facilities, personnel, funds and other requirements available.

(3) To promote and conduct scientific research and training related to the care of the sick and injured insofar as such research and training can be conducted in connection with the hospital.

(4) To participate so far as circumstances may warrant in any activity designed and conducted to promote the general health of the community.

(5) To cooperate with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district.

La. Rev. Stat. 46:1053 Commission; qualification of members; appointment; vacancies; compensation; removal of commissioners; certain powers

A. Any hospital service district formed or created under the provisions of this Chapter shall be governed by a board of five commissioners, hereafter referred to as commission, who shall be qualified voters and residents of the district. The commission shall be appointed by the police jury of the parish. Two of the first commissioners so appointed shall serve for two years, two for four years and one for six years.

B. (1) In the parish of St. Mary for Hospital Service Districts Numbers 1 and 2, the governing authority thereof may increase the number of commissioners to not more than seven members; in the parish of St. Helena, the governing authority thereof may increase the number of commissioners to not more than six members.

(2) In any district in which there are six commissioners, three of the first commissioners so appointed shall serve two years, two four years, and one six years. In any district in which there are seven commissioners, three of the first commissioners so appointed shall serve two years, three shall serve four years, and one shall serve six years.

(3) Notwithstanding any provision of this Section to the contrary, at the expiration of the terms of office of the commissioners of Hospital Service District Number 2 of St. Mary Parish serving on July 1, 1991, the successors shall be appointed for a term of four years in the same manner as the predecessor appointees were selected, and no commissioner shall serve for more than two consecutive four year terms.

(4) In the parish of Iberia, the Iberia Parish Hospital Service District No. 1 shall be governed by a commission composed of nine members. The two additional members provided for by this Paragraph shall be appointed by the

governing authority of Iberia Parish from applications submitted by the medical staff of the Iberia General Hospital and Medical Center only. The two additional members shall each serve an initial term of four years and their successors shall be appointed for four-year terms. Upon the expiration of the terms of the current board of commissioners or in the case of a vacancy on the board of commissioners on or after August 15, 1995, each successor shall be appointed for a four-year term.

C. (1)(a) At the expiration of their respective terms of office, the successors to such appointees shall be appointed within thirty days for six-year terms. The police juries shall fill vacancies in the same manner as the predecessor appointees were selected.

(b) Notwithstanding the provisions of this Paragraph, upon the expiration of a term of office of a commissioner of Hospital Service District No. 3 of Vermilion Parish, the term of office of his successors to the board of commissioners of said district shall be two years.

(2)(a) The parish governing authority of the parish in which the district is located may permit a per diem to each member of the commission in an amount of not less than twenty-five dollars nor more than forty dollars for each day of his attendance at meetings of the commission, not to exceed twelve meetings per year payable out of the funds of the hospital service district.

(b) Notwithstanding any other provision of law to the contrary, the parish governing authority of St. Mary Parish may permit a per diem to each member of the board of commissioners of Hospital Service District No. 2 of the parish of St. Mary in the amount provided in this Subsection for each day of attendance at meetings of the commission, not to exceed twenty-four meetings per year.

(3) Any member of the commission may be removed from office for cause and his appointment rescinded by two-thirds vote of the elected membership of the parish governing authority which appointed him.

D. (1) The governing authority of the parish of Washington may increase to nine the number of commissioners for the Washington Parish Hospital Service District Number One. One commissioner shall be appointed from each ward in that district. The additional member shall be appointed from Ward Three.

(2) Notwithstanding any other provision of this Section to the contrary, the governing authority of Washington Parish may permit a per diem to each member of the commission in an amount not to exceed seventy-five dollars for each day of his attendance at meetings of the commission not to exceed twelve regular meetings per year and twelve emergency meetings per year, payable out of funds of the hospital service district.

E. In the Parish of Ouachita, the Ouachita Parish Hospital Service District within which is situated the G. B. Cooley Hospital for Retarded Children, shall be governed by a board composed of seven members. One of the first additional commissioners so appointed shall serve for two years, and one for four years; thereafter, their terms shall be as provided in Subsection C of this Section.

F. In the parish of Richland, the Richland Parish Hospital Service District, within which is situated the Richland Parish Hospital, shall be governed by a board of commissioners composed of seven members. These two additional members shall be medical doctors. One of the first additional commissioners so appointed shall serve for two years, and one for four years; thereafter, their terms shall be as provided in Subsection C of this Section. The Richland Parish Hospital Service District Number 1-B, within which is situated the Richardson Medical Center in Rayville, shall be

governed by a board of commissioners consisting of six members. One of the members shall be a physician selected by the staff of the Richardson Medical Center. Notwithstanding any other provision to the contrary, the parish governing authority of Richland Parish may permit a per diem to each member of the board of commissioners of the Richland Parish Hospital Service District in an amount of not less than twenty-five dollars nor more than fifty dollars for each day of his attendance at meetings of the commission, not to exceed twenty-four meetings per year payable out of the funds of the hospital service district.

G. The Hospital Service District Number One of the parish of Avoyelles shall be governed by a board of commissioners composed of seven members. One of the first additional commissioners so appointed shall serve for two years, and one for four years; thereafter, their terms shall be as provided in Subsection C of this Section.

H. In the parish of Allen, the governing authority thereof may increase the number of commissioners to not more than seven members. One of the first additional commissioners so appointed shall serve for two years, and one for four years; thereafter, their terms shall be as provided in Subsection C of this Section.

I. In the parish of Bienville, the governing authority thereof may increase the number of commissioners for the hospital service district therein to not more than seven, three of the first commissioners so appointed shall serve two years, three shall serve four years and one shall serve six years.

I. In the parish of Bienville, the governing authority thereof may increase the number of commissioners for the hospital service district therein to not more than seven. Of the commissioners so appointed, three shall serve an initial term of three years, three others shall serve an initial term of four years, and the other member shall serve an initial term of six years.

J. In the parish of Union, the East Union Parish Hospital Service District shall be governed by a board composed of seven commissioners appointed in such a manner that there shall be a resident of each of Wards One, Two, Five, Six, Seven, and Eight of the parish and one at-large member. Such at-large member shall be appointed by the board and shall serve an initial term of two years. The member from Ward One shall serve an initial term of four years. Thereafter, their terms shall be as provided in Subsection C of this Section.

Board members serving on the effective date of this Subsection shall serve until the expiration of their terms, and their successors shall be appointed in such a manner that there shall be a resident of each of Wards Two, Five, Six, Seven, and Eight, all to serve terms as provided in Subsection C of this Section.

K. (1) In the parish of Vermilion, Hospital Service District No. 1 shall be governed by a commission composed of seven members. The additional members provided for by this Paragraph shall be appointed for initial terms of six years each by the police jury of the parish of Vermilion and thereafter shall serve six-year terms.

(2) Notwithstanding any other provision of this Section to the contrary, the governing authority of Vermilion Parish may permit a per diem to each member of the commission in an amount not to exceed fifty dollars for each day of his attendance at meetings of the commission not to exceed twenty-four regular meetings per year and twelve special meetings per year, payable out of funds of the hospital service district.

L. (1) The Vermilion Parish Hospital Service District No. 2 shall be governed by a board of commissioners composed of seven members. One member shall be appointed by the parish governing authority from among the physicians who are residents of the district. If no physician is willing to

serve, then the parish governing authority may appoint any person who is otherwise eligible to fill the office. Members appointed from among the physicians of the district and members appointed in place of such member shall serve two-year terms. All other members shall serve six-year terms.

(2) Notwithstanding any other provision of this Section to the contrary, the governing authority of Vermilion Parish may permit a per diem to each member of the commission in an amount not to exceed fifty dollars for each day of his attendance at meetings of the commission not to exceed twenty-four regular meetings per year and twelve special meetings per year, payable out of funds of the hospital service district.

M. (1) Notwithstanding any other provisions of this Chapter, any hospital service district formed or created in the parish of Terrebonne under the provisions of this Chapter shall be governed by a board composed of not less than five nor more than eleven commissioners, hereafter referred to as the commission or the board of commissioners, and the parish governing authority shall establish the exact number of commissioners and appoint them.

(2) Insofar as possible the initial commissioners shall be appointed with staggered terms so that a substantially equal number of commissioners are appointed for one-two- and three-year initial terms and if eleven commissioners are appointed four commissioners shall serve for a term of one year, four commissioners shall serve for a term of two years, and three commissioners shall serve for a term of three years; however, all commissioners shall serve subject to removal only upon a showing of just cause by the parish governing authority.

(3)(a) Upon the expiration of the term of a commissioner serving on August 15, 1997, a successor shall be appointed by the parish governing authority for a term of four years.

(b) No person who has been appointed to serve as a commissioner for more than two and one-half terms in three consecutive terms, which period of service began on or after August 15, 1997, shall be appointed for a succeeding term.

(4) If a vacancy occurs for any other reason, a successor commissioner shall be appointed by the parish governing authority for the remainder of the unexpired term.

(5) A commissioner shall hold office until his successor has been appointed and may succeed himself when so appointed by the parish governing authority subject to the limitation provided in Subparagraph(3)(b) of this Subsection.

(6) Each commissioner shall be a registered voter with a minimum of two years prior residency within the parish.

(7) Any board of commissioners in the parish of Terrebonne may contract with the Terrebonne Parish governing authority under the provisions of the Local Services Law and other constitutional and statutory authority with respect to the planning, financing, construction, maintenance, and operation of Terrebonne General Hospital, including but without limitation the issuance of bonds by the hospital district as authorized by law for financing any portion of project cost and the expenditure of hospital bond funds of the parish of Terrebonne, on such terms and conditions as the board of commissioners and the governing authority shall determine to be in the public interest.

(8) The board of commissioners may appoint a hospital director and otherwise provide for the administration of any facilities under its control without the approval of the medical staff as elsewhere required in this Chapter but in so doing may consult with the medical staff or others as the commissioners deem appropriate.

(9) The terms and provisions of any agreement between the board of commissioners, as the governing authority of the hospital district, and the governing authority of the parish of Terrebonne, shall control over other provisions of this Chapter with respect to the planning, financing, construction, maintenance, and operation of Terrebonne General Hospital unless prohibited by law.

N. The governing authority of the parish of Caddo may increase the number of commissioners for the North Caddo Hospital Service District therein to six. The additional commissioners so appointed shall serve until the expiration of the term of the successor now serving of the original commissioner appointed to a term of six years under the provisions of Subsection A of this Section; thereafter, his successor shall be appointed to a term of six years.

O. The Acadia-St. Landry Hospital Service District shall be governed by a board of commissioners composed of six members. The additional commissioner herein provided for shall be appointed from the active medical staff serving the district. Notwithstanding the provisions of Subsection C, the additional commissioner so appointed shall serve a term of two years and his successors shall serve terms of two years. The terms of all other commissioners shall be as otherwise provided in this Section.

P. Notwithstanding any other provision to the contrary, the parish governing authority of Iberia Parish may permit a per diem to each member of the commission in an amount of not less than twenty-five dollars nor more than forty dollars for each day of his attendance at meetings of the commission not to exceed thirty-six meetings per year, payable out of the funds of the hospital service district.

Q. (1) Concordia Parish Hospital Service District Number One shall be governed by a board of commissioners composed of seven members. The two additional commissioners provided for by this Subsection shall be

appointed initially by the governor. Each such appointment by the governor shall be submitted to the Senate for confirmation. One of the additional commissioners shall be appointed to serve an initial term of two years and one to an initial term of four years. The initial additional members appointed pursuant to this Subsection may be removed from office for cause and the appointment rescinded by the governor.

(2) Upon expiration of the term of each of the initial two additional commissioners appointed pursuant to this Subsection, the successors of one of such additional commissioners shall be appointed by the police jury of the parish and shall serve six-year terms and be subject to removal as provided in Subsection C of this Section. Each of the successors of the remaining additional commissioner shall be designated as the physician member. The police jury shall appoint the immediate past chief of staff of the hospital medical staff as the physician member. The term of the physician member shall be two years and the outgoing chief of staff shall be his successor. The physician member shall not be subject to the requirements of Subsection A of this Section that commissioners be qualified voters and residents of the district.

R. The Catahoula Parish Hospital Service District No. One shall be governed by a board of commissioners composed of seven members. The two additional commissioners provided for by this Subsection shall be appointed by the Catahoula Parish Police Jury.

R. The Catahoula Parish Hospital Service District Number One shall be governed by a board of commissioners composed of seven members. The two additional commissioners provided for by this Subsection shall be appointed by the governing authority of Catahoula Parish, shall serve initial terms of six years each, and thereafter shall

serve six year terms as provided in Subsection C of this Section.

S. The Catahoula Parish Hospital Service District Number Two shall be governed by a board of commissioners composed of seven members. The two additional members provided for by this Subsection shall be appointed by the governing authority of Catahoula Parish and shall serve initial terms of two years each, and their successors thereafter shall serve six-year terms as provided in Subsection C of this Section.

T. The Lower South Cameron Memorial Hospital Service District shall be governed by a board of commissioners composed of seven members. The two additional members provided for by this Subsection shall be appointed by the governing authority of Cameron Parish and shall serve initial terms of two years each, and their successors thereafter shall serve six-year terms as provided in Subsection C of this Section.

U. (1) The Natchitoches Parish Police Jury may increase the membership of the board of commissioners of the Natchitoches Parish Hospital Service District to not more than seven members. The two additional members provided for by this Subsection shall be appointed by the police jury for initial terms of six years each and their successors shall serve six-year terms.

(2) Notwithstanding any other provision of law to the contrary, one of the members appointed to the Natchitoches Parish Hospital Service District shall be a member of the governing authority of Natchitoches Parish.

V. (1) The Pointe Coupee Parish Hospital Service District Number One, or the Pointe Coupee Parish Health Services District Number One if the hospital service district is so renamed as provided in R.S. 46:1051(D), shall be governed by a board of commissioners composed of nine members.

The additional commissioners provided for by this Subsection shall be appointed by the governing authority of Pointe Coupee Parish. Two of the additional commissioners so appointed shall serve initial terms of two years each, and two shall serve initial terms of four years each; thereafter, their successors shall serve six-year terms as provided in Subsection C of this Section.

(2) Notwithstanding any other provision of law to the contrary, three of the members appointed to the board of commissioners of Pointe Coupee Parish Health Services District Number One may be members of the governing authority of Pointe Coupee Parish.

W. The Rayne Branch Hospital Service District of the parish of Acadia shall be governed by a board of commissioners composed of seven members. The two additional members provided for by this Subsection shall be appointed by the governing authority of Acadia Parish and shall serve initial terms of six years each, and their successors thereafter shall serve six-year terms as provided in Subsection C of this Section.

X. The Plaquemines Parish Hospital Service District Number One shall be governed by a board of commissioners composed of nine members, one from each councilmanic district of Plaquemines Parish. Each such member shall be a qualified voter and resident of the district and shall be appointed by the Plaquemines Parish Council from nominations by the president of Plaquemines Parish. Such members shall serve terms concurrent with the terms of the Plaquemines Parish Council.

X. The board of commissioners of the Plaquemines Parish Hospital Service District Number One shall be composed of nine commissioners, one from each of the Plaquemines Parish council districts, who shall be qualified voters and residents of the district, nominated by the parish president or

parish council, and appointed by the Plaquemines Parish Council.

Y. The Hospital Service District Number One of East Baton Rouge Parish shall be governed by a board of commissioners composed of seven members. The two additional members provided for by this Subsection shall be appointed by the parish governing authority and shall serve initial terms of two years each, and their successors shall serve six-year terms.

Z. The Merryville Hospital Service District of Beauregard Parish shall be governed by a board of commissioners composed of seven members. The two additional members provided for by this Subsection shall be appointed by the mayor and board of aldermen of the town of Merryville and shall serve initial terms of two years each, and their successors shall serve six-year terms.

AA. Notwithstanding any provision of this Section to the contrary, the Hospital Service District Number One of St. Landry Parish shall be governed by a board of commissioners composed of seven members. One additional commissioner provided for by this Subsection shall be appointed by the St. Landry Parish Police Jury and shall serve six-year terms and the other additional commissioner shall be the chief of the medical staff of the hospital located within said service district and shall serve a term concurrent with his term as chief of staff.

BB. In the parish of Jackson, the Jackson Parish Hospital Service District shall be governed by a commission composed of seven members. The additional members provided for by this Subsection shall be appointed by the police jury for initial terms of six years each and their successors shall serve six-year terms.

CC. Hospital Service District No. 1 of Assumption Parish shall be governed by a board of commissioners composed of seven members. The two additional members provided for

by this Subsection shall be appointed by the parish governing authority and shall serve initial terms of two years. Such initial terms shall not begin prior to January 1, 1996. Successors to the two additional members shall serve six-year terms.

DD. (1) The Claiborne Parish Hospital Service District Number Three shall be governed by a board of commissioners composed of nine members. The governing authority of Claiborne Parish shall appoint the commissioners as follows:

(a) One member appointed from police jury district numbers one and two.

(b) One member appointed from police jury district numbers three and four.

(c) One member appointed from police jury district numbers five and six.

(d) One member appointed from police jury district numbers seven and eight.

(e) One member appointed from police jury district numbers nine and ten.

(f) Two members appointed, at large, from Claiborne Parish.

(g) Two physicians practicing medicine within Claiborne Parish.

(2) The terms of the initial seven non-physician members shall be determined by lot at the first meeting with one commissioner serving for one year, two commissioners serving for two years, two commissioners serving for three years, and two commissioners serving for four years. Their successors shall each serve four-year terms.

(3) The terms of the initial two physicians shall be determined by the governing authority of Claiborne Parish, prior to the first meeting of the district, with

one physician serving for one year and the other physician serving for two years, and their successors shall each serve two-year terms.

(4) All vacancies or replacements shall be filled by appointment by the governing authority of Claiborne Parish. Nothing in this Subsection shall impair or affect the operation of any hospital service district in Claiborne Parish.

La. Rev. Stat. 46:1054 Officers; meetings

A. The commission shall elect one of its members chairman and one vice chairman. The chairman of the Acadia-St. Landry Hospital Service District shall vote only in the event of a tie vote.

B. All meetings of the commission shall be held at the domicile of the district established by the police jury. At least three regular meetings shall be held annually. Special meetings may be held at such times and places as shall be specified, by call of the chairman or the police jury.

La. Rev. Stat. 46:1055 Powers and duties of commission

A. In addition to the duties defined elsewhere in this Chapter, the commission shall have the duty and authority:

(1) To represent the public interest in providing hospital and medical care in the district.

(2) To advise the police jury and the hospital director on problems concerning the operation of the hospital and other facilities.

(3) To make, alter, amend, and promulgate rules and regulations governing the conduct of the hospital.

(4) To conduct hearings and pass upon complaints by or against any officer or employee of the district.

(5) To review and modify, or set aside any action of the officers or employees of the district which the commission may determine to be desirable or necessary in the public interest.

(6) To appoint, with the approval of the medical staff, a director of the hospital and to perform such other duties as may now or hereafter be required by law.

(7) To appoint the necessary standing and special committees which may be necessary to carry out the purposes of this Chapter.

(8) To establish rates of pay for the use of facilities provided by the district.

(9) To enter into lease agreements with recognized and duly constituted nonprofit associations which are primarily engaged in the operation of hospitals.

B. In addition to the powers and duties set forth in Subsection A of this Section, the commission may enter into a special services agreement with any person, including but not limited to a hospital management firm or hospitals, to manage, operate, and administer a hospital or hospitals, or any part thereof, under the control of the commission for the benefit of the hospital service district. Any special services agreement may include a negotiated lease of the district's facilities where the agreement provides for permanent improvements to be made, constructed, or placed upon the leased facilities in the amount of not less than one million dollars, providing that the term of the lease shall not exceed fifty years, and the lessor shall reserve all mineral rights to any land involved. The term of all such negotiated leases in force on July 1, 1987, may be extended by an additional term not to exceed twenty years, on such terms and conditions as may be negotiated between hospital service districts and their respective lessees. Any lease may be mortgaged, pledged, hypothecated, subleased, transferred, or assigned only for the purpose of financing the permanent

improvements. The notice of intent to enter into a special services agreement shall be published in the official journal at least sixty days prior to the effective date of the contract. However, any such hospital service district, including any such district which has contracted with an association or entity primarily engaged in the operation of hospitals to manage, operate, and administer a hospital or hospitals within the hospital service district, shall be considered a public entity as defined under the provisions of R.S. 38:2211(A)(1) and all construction work undertaken shall be performed in accordance with the provisions of R.S. 38:2212. The provisions of this Subsection shall not apply to any facility of the charity hospital system of the state of Louisiana.

C. With approval of the police jury, a commission may without the necessity of competitive bidding or competitive negotiations also enter into special service agreements with any person who is a licensed contractor operating under any contract with the Louisiana Department of Health and Human Resources, whereby the licensed contractor will operate and manage all or any part of any facility owned by the hospital service district, in a manner and for a purpose consistent with the types of services being provided by the licensed contractor under any contract with the Department of Health and Human Resources; provided that prior to entering into any such special service agreement, both the police jury and the commission must find that continued operation of all or any part of such facility for hospital purposes is no longer necessary or feasible to accomplish the objects and purposes set forth in R.S. 46:1052. The provisions of this Subsection shall not apply in the parishes of Lafourche and Terrebonne and in Ward 11 of Jefferson Parish.

La. Rev. Stat. 46:1056 Hospital director

The commission with the approval of the medical staff, shall appoint a hospital director, hereafter referred to as "director," who has had experience in the field of hospital administration and is familiar with the principles and methods of hospital and institutional care. He shall be a full-time employee of the district or of the hospital management firm and shall receive a salary fixed by the commission. He shall serve at the pleasure of the commission.

La. Rev. Stat. 46:1057 Duties of director

In addition to the duties imposed upon him by other provisions of this chapter, it shall be the duty of the director:

(1) To attend all meetings of the commission and to act as secretary and keep the official minutes of the proceedings.

(2) With the consent of the commissioners, and subject to such budgetary limitations and any civil service laws in effect, the director shall have power to establish positions and to make appointments thereto; to establish rates of pay; to abolish positions; to transfer duties among positions; to assign duties to, direct and control the work of, and transfer, promote, demote, remove and otherwise change the status of employees of the district.

(3) To make and publish such reports regarding the work of the district as may be required by law, or which he may be directed to make by the commission.

(4) To see that the policies relating to the conduct of the affairs of the district which have been established by the commission are carried out.

(5) To cooperate with the medical staff in the performance of the policies which it may establish.

(6) To prepare an annual budget for approval by the commission and the police jury.

(7) To recommend to the commission the scale of rates to be charged for services rendered by the district.

(8) To provide for adequate medical records and reports.

(9) To control and direct all business affairs of the district. By way of extension and not of limitation, these duties shall include the keeping of the accounts of the district, making necessary purchase of equipment, supplies and materials, making major and minor repairs to physical facilities.

(10) To receive and receipt for and keep a correct accounting of all gifts, bequests, grants-in-aid, and other revenues received by the district and with the consent of the commission, to expend the proceeds of all such gifts, bequests, grants-in-aid and other revenues for the purpose designated in this chapter and subject to any conditions that may be imposed in any act of donation or any law providing grants-in-aid or other revenues for such purpose.

(11) To perform any other duties and functions which he or the commission consider necessary or desirable to carry out the purposes of this chapter.

La. Rev. Stat. 46:1058 Medical staff

The commission shall appoint a medical staff. Such appointments shall be made upon the recommendations of the physicians who are authorized to practice within the hospital.

It shall be the duty of the medical staff:

(1) To provide professional care of the sick and injured in the hospitals;

(2) To give advice and assistance to the commission and director relating to standards of operation and professional problems;

(3) To participate in the educational activities of the district;

(4) To promulgate rules and regulations for the conduct of the medical staff for approval of the commission;

(5) To elect annually one of its members as chief of staff and to elect from its members the heads of any specialized services of the hospital; and

(6) To approve the appointment of the hospital director made by the commission.

La. Rev. Stat. 46:1059 Petition for organization of district

Upon failure or refusal of the police jury of any parish to organize a hospital service district, they are hereby required to and shall form such district when petitioned to so do upon petition presented to the police jury, signed by not less than twenty-five persons owning or assessed for lands in said districts. In presenting such petition to the police jury, such petition shall set forth substantially the boundaries of the district which is proposed to be organized.

La. Rev. Stat. 46:1060 District to constitute body corporate; powers

Any hospital service district thus created and named by any police jury of any parish in the state shall constitute a body corporate in law with all the powers of a corporation, shall have perpetual existence, shall have the power and right to incur debts and contract obligations, to sue and be sued, and to do and perform any and all acts in its corporate capacity and its corporate name necessary and proper for the carrying out of the objects and purposes for which the hospital service district was created. Such hospital service district shall have the right and power of expropriating property for the purpose of acquiring land for any purpose

that it may find necessary in the operation of a hospital service district and may reacquire [FN1] by donation or purchase, any existing hospital facility in the district. It shall also have the power and authority to acquire any and all necessary equipment and buildings for the purpose of performing the objects for which it is formed, and shall own all sites and physical facilities which are acquired either by donation, purchase, expropriation, exchange and otherwise in full ownership.

La. Rev. Stat. 46:1061 Procedure in organizing district

In the creation of a hospital service district, the police jury shall at the same time designate a time and place for the first meeting of the said commission, the meeting to take place within sixty days from the date of their appointment. At the first meeting of the commission, they shall proceed to organize by electing a chairman and a vice chairman.

It shall be the duty of the chairman to preside over the meetings of the commission and to perform such other duties as are usually required of presidents or chairmen of other corporate bodies. It shall be the duty of the vice chairman to act in the absence of the chairman and in case of the disability of the chairman to act.

The commission shall elect the director of the hospital who shall serve as secretary and treasurer for the commission. The director shall furnish a surety bond in a sum equal to the amount of taxes collected in said district during any one year. The premium on this bond shall be paid by the hospital district out of its funds. The commission shall have authority to fix his salary and define his authority and duties not otherwise provided in this chapter. The director shall devote his entire time of said office and shall hold his office at the pleasure of the commission.

La. Rev. Stat. 46:1062 Rules and regulations; contracts

The hospital district or the commission of the hospital district shall have the power, and it shall be their duty to adopt rules and regulations for the proper conduct and operation of any hospital or medical facilities under its administration. They shall have the power and authority to enter into contracts for the construction of hospitals and medical facilities necessary for the administration of services for their district.

La. Rev. Stat. 46:1063 Domicile; service of citation

The police jury creating a hospital service district, with corporate powers, shall designate the domicile of such corporation, at which domicile it shall be sued and service of citation made on the director, and in his absence, upon the chairman of the commission, and in his or their absences, then upon the vice chairman of the commission; provided that in fixing the domicile of the district the police jury shall at all times fix the same at some place within the district.

La. Rev. Stat. 46:1064 Districts as political subdivisions; acquisition of land and physical facilities; special maintenance taxes; incurring debt; bonds; audits

A. The hospital service districts as defined in R.S. 46:1072 are hereby declared to be political subdivisions of the state, and for the purpose of purchasing and acquiring lands and purchasing, acquiring, constructing and maintaining hospitals, nursing homes, physicians and dentists offices, laboratories, and other physical facilities necessary to carry out the purposes of this Chapter. Title to such land and physical facilities shall be in the public. Such districts shall be subdivisions of the state of Louisiana within the meaning of the laws of Louisiana relating to the voting and levy of

special maintenance taxes incurring debt and issuing bonds therefor, including particularly but without limitation R.S. 39:504.1, 515-518, 551-571, 575-577, 611-617, 701-706, and 911, and shall be authorized to issue hospital revenue bonds pursuant to R.S. 39:559.1 and 1011-1024, and as otherwise permitted by law. Hospital service districts are hereby further authorized to issue bonds pursuant to the foregoing to refund outstanding bonded indebtedness whether issued by such hospital service district or by another political subdivision of the state on behalf of such hospital service district or in respect of any hospital facilities owned or operated by any such hospital service district.

B. Each district shall cause to be conducted annually, by a duly qualified certified public accountant, an audit and examination of its books and accounts, said audit to be filed with the legislative auditor within six months after the close of the period audited. The legislative auditor shall have the authority to prescribe the terms and conditions of any such audit conducted by a certified public accountant and to require the district to present said terms and conditions to him for approval prior to the commencement of said audit. The legislative auditor shall have access to the working papers of the accountant during the examination and subsequent to its termination. The legislative auditor is authorized to conduct an independent audit and examination of the books and accounts of any hospital service district pursuant to R.S. 24:513.

La. Rev. Stat. 46:1065 Election on question of incurring debt, issuing bonds, and levying special tax

Whenever an election shall be called by the governing body of the district for the purpose of submitting to the qualified electors of any hospital service district the question of incurring debt and issuing bonds for the purpose of acquiring property to be used for hospital purposes, the governing body of the district may in the same election

submit to the qualified electors of the district, in the manner provided by Part II of Chapter 4 of Title 39 of the Louisiana Revised Statutes, a proposition to levy a special tax not to exceed five mills on the dollar for a period not to exceed ten years for the purpose of constructing, maintaining and operating the district's hospital facilities.

La. Rev. Stat. 46:1066 Federal and state aid

Hospital service districts created hereunder shall have full power to do such things and enter into such contracts and agreements with the United States of America or with any state or federal agency or instrumentality as may be necessary to procure aids and grants to assist such districts in carrying out the purposes for which they are created.

La. Rev. Stat. 46:1067 Districts comprising all or portions of two or more parishes; cooperative agreements

If and when conditions warrant the creation of a hospital service district which comprises all or portions of two or more parishes, the police juries of the parishes to be included in the district shall have full authority to enter into the necessary agreements to establish the district on a cooperative basis, subject to the following conditions:

(1) Each police jury shall, subject to other laws which may be in effect, exercise full discretion on whether it shall enter into such cooperative agreement.

(2) Each police jury shall have authority to appoint commissioners for the district as nearly as possible in proportion to the assessed valuation of the property of the parish in the district.

(3) Each police jury shall receive such reports as are necessary on the entire operations of the district.

(4) Each police jury shall have the authority to review the work of the entire district to the same extent as is authorized herein when the entire district is within the parish.

(5) The police juries have authority to appoint committees composed of its members who reside within the hospital district to review the work of the district and make recommendations to the police juries involved.

La. Rev. Stat. 46:1068 Retirement system

Hospital service districts created hereunder acting through the governing authority thereof, shall have full power to establish and maintain actuarially sound pension and retirement systems in the benefits of which shall be included all appointive officers and employees of such districts. All officers and employees of any such district who are already or who will be included by reason of their employment in the benefits of any other pension and retirement system heretofore established by laws other than the Federal Social Security Act, shall be excluded from the benefits of the pension and retirement system established as authorized herein, and nothing herein contained shall be held or construed as affecting the provisions of such other pension and retirement system laws. When any actuarially sound pension and retirement system is established by the adoption of an ordinance or ordinances by commission of any hospital service district, hereunder, such pension and retirement system shall in all respects have the force and effect of law. Hospital service districts hereunder may make contributions into the said pension and retirement systems out of available funds of the said districts, and may make contracts of insurance with any insurance company legally authorized to do business in this state, insuring its officers and employees under policies of group insurance covering hospitalization, pension, and retirement for such officers and employees, and may agree to match payments of officers and employees for

the premiums and charges for any such contracts payable out of the funds of the said district. Districts may enter into such other contracts, including Trust Agreements with banks having trust powers, which contracts are necessary and incidental to creating and maintaining an actuarially sound pension and retirement system.

La. Rev. Stat. 46:1069 Hospital service district hospitals; contracts for materials, services, or supplies

Hospital service district hospitals may contract for materials, services, or supplies under a shared service or group purchasing arrangement with other hospitals, public and/or private, subject to the provisions of R.S. 38:2212.

La. Rev. Stat. 46:1071 Legislative findings and purpose

The legislature hereby finds that the market for hospital and health care services is becoming increasingly competitive. The legislature finds that the hospital and other health care providers are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public. The legislature finds that this increasing competition is forcing hospitals and other health care providers to develop market strategies and strategic plans to effectively compete. The legislature further finds that hospital service districts are presently at a competitive disadvantage. The legislature hereby declares that the purpose of R.S. 46:1071 through 1076 is to enhance the ability of a hospital service district to compete effectively and equally in the market for health care services. Towards this end, the provisions of R.S. 46:1071 through 1076 shall be construed liberally.

La. R.S. 46:1072 Definitions

As used in this Subpart, the following words and phrases shall have the following meanings ascribed for each unless the context clearly indicates otherwise:

(1) "Hospital health services" means but is not limited to any clinical, diagnostic, or rehabilitation service and any administrative, managerial, or operational service incident thereto.

(2) "Hospital service district" means:

(a) A political subdivision of the state of Louisiana organized pursuant to an Act of the Legislature of Louisiana or pursuant to R.S. 46:1051 et seq.

(b) A hospital owned by a city, parish, or other political subdivision of the state of Louisiana or a hospital owned or operated by the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College.

(3) "Market strategies" means any plan, strategy, or device developed or intended to promote, sell, or offer to sell any hospital health service.

(4) "Strategic plans" means any plan, strategy, or device developed or intended to construct, operate, maintain a health facility or engage in providing, promoting, or selling a hospital health service.

(5) "Tangible benefit" means but is not limited to:

(a) Any reasonable expectation of a demonstrable increase in or maintenance of usage of the provider's services,

(b) Any contractual provision requiring quality control of patient care and participation in a resource monitoring procedure, or

(c) Any reasonable expectation of prompt payment for any service rendered.

(6) "Hospital service district commission" means the governing authority or managing board of a hospital service district as defined herein.

La. R.S. 46:1073. Market strategies and strategic planning

A. In addition to powers and duties otherwise provided and notwithstanding any law to the contrary, a hospital service district may develop marketing strategies for its existing hospital health services or any hospital health service to be provided in the future and may develop strategic plans for the development of any future hospital health service or facility.

B. Notwithstanding the provisions of R.S. 42:4.1 et seq. or any other law to the contrary, a hospital service district commission may hold an executive session for the discussion and development of marketing strategies and strategic plans.

C. Notwithstanding the provisions of R.S. 44:1 et seq. or any other law to the contrary, any marketing strategy and strategic plan of a hospital service district commission and the facility owned or operated by the district shall not be public record and shall be confidential but shall be subject to court subpoena.

La. R.S. 46:1074 Medical office buildings and facilities leases; disposition of immovable property

A. In addition to the powers and duties otherwise provided and notwithstanding the provisions of R.S. 41:1211 et seq. or any other law to the contrary, a hospital service district commission and any health facility it owns or operates may acquire, construct, and maintain medical office buildings and facilities and may negotiate the lease of such medical office buildings and facilities or portions thereof provided the lease rental shall be sufficient to recoup over a period of twenty years the capital investment of such hospital service district

commission or that of any health facility it owns or operates. Such contract of lease may provide for uniform, staggered, or indexed rental payments, but no balloon rental payments shall be allowed.

B.(1) In addition to the powers otherwise provided and notwithstanding any other law to the contrary, a hospital service district commission, whether created under this Title or otherwise, and any health facility it owns or operates may sell and convey immovable property to any person or legal entity if the fair market value of the property, as determined by an appraisal, does not exceed:

(a) Two hundred fifty thousand dollars for a hospital service district commission owning or operating a hospital with a licensed bed capacity of one to fifty-nine beds.

(b) Five hundred thousand dollars for a hospital service district commission owning or operating a hospital with a licensed bed capacity of sixty to one hundred twenty beds.

(c) One million dollars for a hospital service district commission owning or operating a hospital with a licensed bed capacity of one hundred twenty-one beds or more.

(2) Prior to the sale and conveyance authorized by Paragraph (1) of this Subsection, the hospital service district commission shall adopt a resolution declaring the immovable property sought to be sold and conveyed to be unnecessary for the operations of such hospital service district or any health facility it owns or operates.

(3) Within six months prior to the sale and conveyance authorized by Paragraph (1) of this Subsection, the hospital service district commission shall obtain an appraisal of the immovable property to be sold or conveyed. The immovable property of the hospital service district or any health facility it owns or operates

shall not be sold and conveyed for less than ninety percent of the appraised value.

(4) Prior to the sale and conveyance authorized by Paragraph (1) of this Subsection, the hospital service district commission shall obtain the documented approval of the governmental authority charged with the appointment of the commissioners to the hospital service district if the appraised value of the immovable property to be sold and conveyed exceeds:

(a) One hundred thousand dollars for a hospital service district commission owning or operating a hospital with a licensed bed capacity of one to fifty-nine beds.

(b) Two hundred thousand dollars for a hospital service district commission owning or operating a hospital with a licensed bed capacity of sixty to one hundred twenty beds.

(c) Three hundred thousand dollars for a hospital service district commission owning or operating a hospital with a licensed bed capacity of one hundred twenty-one beds or more.

(5)(a) A sale and conveyance conducted under the provisions of this Subsection shall not require a public referendum or public advertisement.

(b) A sale and conveyance conducted under the provisions of this Subsection shall not be subject to any public bid law.

(c) Nothing in this Subsection shall prohibit or limit the sale and conveyance of immovable property owned by a hospital service district or any health facility it owns or operates pursuant to any other provision of law.

(d) The provisions of this Subsection shall not apply to a hospital owned or operated by the Board of

Supervisors of Louisiana State University and Agricultural and Mechanical College.

C. The term "licensed bed capacity" as used in this Section means the number of beds authorized for the hospital under licensing by the Department of Health and Hospitals.

La. R.S. 46:1075 Advertising

In addition to the powers and duties otherwise provided and notwithstanding the provisions of R.S. 43:111 et seq. or any other law to the contrary, a hospital service district commission and any health facility owned or operated by such commission may advertise in any medium including but not limited to a newspaper, book, pamphlet, billboard, periodical, or radio and television station.

La. R.S. 46:1076 Medical staff representation on commission

Notwithstanding the provisions of R.S. 42:61 et seq. or any other law to the contrary, members of the medical staffs of hospital service district facilities may serve on the hospital service district commission.

La. R.S. 46:1077 Contracts or joint ventures for hospital health services

In addition to the powers and duties otherwise provided and notwithstanding any other law to the contrary, the board of commissioners of a hospital service district and any corporation or health facility owned or operated by such district or commission may contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service. A hospital service district commission contracting with or engaging in a joint venture with any person, corporation, partnership, or group of

persons to offer, provide, promote, establish, or sell a hospital health service shall be presumed to be engaged in a cooperative endeavor as provided by Article VII, Section 14(C) of the Constitution of Louisiana. The commission shall be further presumed to have entered into such contract for the purpose of obtaining a tangible benefit and for a public purpose, and such contract shall not be presumed to be a donation in contravention of Article VII, Section 14(A) of the Constitution of Louisiana.

No. 99-210

Supreme Court, U.S.
FILED
SEP 30 1999
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, *et al.*,
Petitioners,
v.
SURGICAL CARE CENTER OF HAMMOND, L.C.,
Respondent.

RICHLAND PARISH HOSPITAL SERVICE DISTRICT 1-B, *et al.*,
Petitioners,
v.
RALPH ABRAHAM, M.D., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the unanimous, fact-bound, and interlocutory rulings of the Fifth Circuit below that under the standards for determining when local government entities are entitled to state action immunity—recently clarified by this Court in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985)—petitioners are not entitled to blanket immunity for their anticompetitive conduct.

RULE 29.6 STATEMENT

Respondent Surgical Care Center of Hammond, L.C. notes that it is a private limited liability company d/b/a St. Luke's SurgiCare; a majority of its stock is held by Amedisys Surgery Centers, L.C., a private limited liability company that is a wholly owned subsidiary of Amedisys, Inc., a publicly traded Delaware corporation.

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IN THE

Supreme Court of the United States

No. 99-210

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, *et al.*,
Petitioners,

v.

SURGICAL CARE CENTER OF HAMMOND, L.C.,
Respondent.

RICHLAND PARISH HOSPITAL SERVICE DISTRICT 1-B, *et al.*,
Petitioners,

v.

RALPH ABRAHAM, M.D., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the judgments of the United States Court of Appeals for the Fifth Circuit in these cases.

INTRODUCTION

The petition does not meet any of the established criteria warranting certiorari. *See* S. Ct. Rule 10. The Fifth Circuit decisions below that petitioners are not entitled

to state action immunity for their anticompetitive conduct do not conflict with any of this Court's precedents. To the contrary, the Fifth Circuit expressly recognized and applied the " 'foreseeable result' test" (Pet. App. 7) established by this Court, and recently clarified in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985). *See* Pet. App. 5-7. When the Fifth Circuit considered the matter en banc, *every* member of the Court agreed on the result required in these cases pursuant to this Court's precedents, without a single member writing separately to suggest that the Court of Appeals had in any way strayed from this Court's teachings.

The striking unanimity of the en banc court in resolving the state action immunity question presented by these cases is attributable primarily to one factor: the abundant indications in the legislative record that the State of Louisiana has adopted a policy of promoting rather than displacing competition in the market for health care services. *See id.* 7-9. This includes the "declare[d] * * * purpose" of Louisiana law to "enhance" competition between public and private health care providers on "equal[]" terms. La. Rev. Stat. § 46:1071. The overwhelming evidence that the State has *not* adopted a policy of displacing competition in the relevant market readily distinguishes the decisions below from those on which petitioners rely in attempting to manufacture a circuit conflict.

Petitioners' claim that "[f]urther guidance is needed from this Court" (Pet. 2) is overblown. This Court has enunciated the standards governing state action immunity for municipalities in two recent cases—*Hallie* and *Omni*; there is no need to revisit them so soon here. Indeed, the

complete agreement of the en banc court below on the result called for by this Court's precedents entirely undercuts petitioners' assertion that guidance is needed. In any event, this petition is a singularly ill-suited vehicle for making new law in this area, given the exceptionally clear intent of the State of Louisiana to promote competition in the relevant market. Moreover, because these cases are currently in an interlocutory posture, the Court could review them at a later date if they in fact have the unsettling effect hypothesized by petitioners. The petition should be denied.

COUNTERSTATEMENT

1. **Louisiana's Efforts to Promote Competition in the Market for Health Care Services.** The underlying cases revolve around the Louisiana law governing the creation and operation of publicly owned hospitals, or "hospital service districts." *See* La. Rev. Stat. §§ 46:1051-1068.1, 46:1071-1077.[1] Louisiana first authorized its parishes to establish such districts in 1950 to improve the "general health of the community" and "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district." *Id.* § 46:1052(4)-(5). The districts are governed by commissions consisting of various members depending on the particular parish. *See id.* § 46:1053. Commissions are authorized to engage in certain activities necessary to the operation of hospital service districts, but do not have authority over private hospitals or the marketplace at large. *See id.* § 46:1055.

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[1] Petitioners claim that "[m]ost states in the nation have adopted statutes authorizing the creation and operation of public hospitals." Pet. 4. Regardless of whether that is so, the Louisiana statutes are unique due to the lengths to which the State has gone to foster *competition* in the market for health care services and to express its intent to do just that.

In 1984 the Louisiana legislature determined that "the market for hospital and health care services [was] becoming increasingly competitive," and that hospital service districts were at a "competitive disadvantage." *Id.* § 46:1071. In particular, the legislature noted that private "health care providers"—subject to antitrust laws—"are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public," and that "this increasing competition is forcing [such private providers] to develop market strategies and plans to effectively compete." *Id.* Accordingly, the legislature amended the hospital service district law "to enhance the ability of a hospital service district *to compete* effectively and *equally* in the market for health care services." *Id.* (emphases added).[2]

To achieve this "declare[d] * * * purpose," *id.*, Louisiana did two things. First, it exempted public hospitals from certain laws applicable to public agencies, including various sunshine laws. *See id.* § 46:1073B-C. Second, it gave public hospitals the same business powers that had been exercised by private hospitals in this market, including the ability to "develop marketing strategies" and "strategic plans," *id.* § 46:1073, to operate and lease medical buildings, *id.* § 46:1074, and to "advertise," *id.* § 46:1075. In 1985 the legislature added the authority—also exercised by private hospitals subject to antitrust constraints—to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service." *Id.* § 46:1077.

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[2] The circumstances leading to these amendments are set forth in Section 1071 of the statute. The lengthy quotation on pages 5 and 6 of the petition from the *Washington Law Review* has nothing to do with Louisiana or the statutes at issue here.

To be clear, the purpose of these amendments—as the Louisiana legislature made express, and as the statutory provisions evince—was to level the playing field in the market for health care services by enabling public hospitals to compete on "equal[]"—not monopolistic—terms. *Id.* § 46:1071. *See also* La. Att'y Gen. Op. No. 95-346 (Aug. 18, 1995) ("expressed purpose of the statute" is "to permit the hospital service district *equal* ability to compete") (emphasis added).

2. **Petitioners' Efforts to Eliminate Competition in the Market for Health Care Services.** These cases arose because petitioners—Louisiana hospital service districts—have attempted to use the authority given to them by state law "to compete" in the market for health care services to *eliminate* competition in that market. La. Rev. Stat. § 46:1071. The pertinent allegations are summarized below; given the nascent procedural posture of these cases, the allegations must be accepted as true. *See* Pet. App. 13, 59.

a. *Hospital Service District No. 1 of Tangipahoa Parish* v. *Surgical Care Center of Hammond, L.C.* Petitioner Hospital Service District No. 1 of Tangipahoa Parish owns and does business as North Oaks Medical Center ("North Oaks"). North Oaks is the largest hospital in Tangipahoa Parish, Louisiana. It provides inpatient and outpatient surgical care services as well as other acute care, and is managed by Quorum Health Resources, LLC ("Quorum"), a private company. St. Luke's SurgiCare ("St. Luke's")—a private health care facility owned and operated by respondent Surgical Care Center of Hammond, L.C. ("Surgical Care")—is located less than a mile from North Oaks. While St. Luke's is much smaller than North Oaks and only provides outpatient surgical services, it nevertheless offers local residents an alternative to North Oaks for those services. *See* Pet. App. 2-3, 12.

North Oaks and Quorum conspired to drive St. Luke's from the local market for health care services by subjecting St. Luke's to a campaign of anticompetitive conduct. This campaign included North Oaks' effort to use its monopoly power in the acute and inpatient surgical care services market to pressure managed care health plans in the area to sign exclusive contracts with North Oaks, and thus enable North Oaks to extend its monoply control to the outpatient surgical care market as well. This "tying" arrangement has stiffled competition in the surgical care market. In addition, through various actions and policies, North Oaks has sought to intimidate personnel from working at St. Luke's, thwart patient referrals or transfers to St. Luke's, and harm St. Luke's most visible physician-investors, exerting still more pressure on St. Luke's. *See id.* 12-13 & n.1, 29.

In 1997 St. Luke's filed suit against North Oaks and Quorum in the United States District Court for the Eastern District of Louisiana under the Sherman Act, 15 U.S.C. § 2, and state unfair business practices laws. Defendants moved to dismiss the federal claims on the ground that they are entitled to state action immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny, arguing that a "foreseeable result" of the State's delegation of authority to engage in routine business acts such as contracting was the use of such authority in an anticompetitive fashion. The district court granted defendants' motion, and St. Luke's appealed. *See* Pet. App. 28-30.

b. *Richland Parish Hospital Service District 1-B* v. *Abraham*. Petitioner Richland Parish Hospital Service District 1-B owns and operates Richland Medical Center ("Richland Medical"), an inpatient and outpatient primary and second care facility serving Richland Parish, Louisiana. Richland Medical has the only significant

emergency room in the area; it is managed by Spectrum Emergency Care, Inc., a private firm. Richland Medical enters into contracts with individual physicians in the area, pursuant to which the physicians received payments for the patients they treated in Richland Medical's emergency room. Since 1996 Richland Medical officials and certain others have used boycotts, disparagement, tie-in requirements, and other anticompetitive conduct to pressure certain physicians to treat patients only at Richland Hospital. *See id.* 58 & n.17.

In 1997 respondents Ralph Abraham, M.D., Randy Head, M.D., and Ron Morgan, M.D.—individual physicians targeted by such anticompetitive conduct—filed suit against Richland Medical and certain individuals in the United States District Court for the Western District of Louisiana under the Sherman Act, 15 U.S.C. §§ 1, 2, Clayton Act, *id.* §§ 15, 26, and state unfair business practices laws. Defendants moved to dismiss the federal claims on state action immunity grounds. The district court did so, and plaintiffs appealed. *See* Pet. App. 62-64.[3]

3.a. **Fifth Circuit Decisions.** In August 1998 a panel of the Fifth Circuit—"believing it was bound to do so by prior decisions of th[at] court," *id.* 2—issued a decision in the *Surgical Care* case affirming the district court ruling that the municipal defendants were entitled to state action immunity. In so holding, the panel relied in particular

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[3] The petition also sought review of the judgment in *Willis-Knighton Medical Center* v. *City of Bossier City*. That case arose due to the anticompetitive and exclusionary efforts of the City of Bossier City, Louisiana, the Bossier City Medical Center (owned by the City), and certain individual physicians to drive the privately owned WK Bossier Health Center out of the local market for health care services. *See* Pet. App. 37-39. On September 21, 1999, this Court dismissed the petition with respect to the *Willis-Knighton* judgment pursuant to the parties' stipulation as to dismissal and S. Ct. Rule 46.1.

on *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), in which the court—looking to Mississippi law—held that Mississippi had conferred state action immunity upon public hospitals to engage in certain anticompetitive acts. *See* Pet. App. 14, 17-18. Shortly thereafter, the Fifth Circuit vacated the panel decision in *Surgical Care* and set the case for reconsideration en banc.

b. The en banc court—including each member of the prior panel—unanimously held that the defendants were *not* entitled to state action immunity. In so holding, the full court first reviewed this Court's precedents, and in particular *Hallie* and *Omni*. Those cases "clarified the 'foreseeable result' test" for determining whether local government entities are entitled to such immunity. Pet. App. 7. Under this test, a state statute need not make "explicit reference to displacing competition," *id.* 6; it is enough if " 'anticompetitive effects logically would result from [a state's delegation of] broad authority to regulate' " in a particular market. *Id.* 7 (quoting *Hallie*, 471 U.S. at 42). But at the same time, the court noted, there is a difference between "a naked grant of authority to contract" and a grant of authority to engage in an activity—such as zoning—that " 'regularly has the effect of preventing normal acts of competition.' " *Id.* 6-7 (quoting *Omni*, 499 U.S. at 373).[4]

Following these teachings, the en banc court looked for "signals" from state law that Louisiana has adopted a policy of "insulat[ing]" hospital service districts from antitrust liability, but instead found just "the opposite." Pet. App. 8. "The Louisiana statute did not subject St. Luke's or any other businesses to the authority of the hospital

[4] As is clear from the en banc decision itself, in reviewing this Court's precedents, the Fifth Circuit did not "fault[] this Court" (Pet. 11) for anything, but rather carefully analyzed this Court's recent decisions. *See* Pet. App. 6-7.

service district." *Id.* at 7. "[I]t merely added to the hospital service district's list of available powers, by enabling it to form joint ventures and conduct closed meetings." *Id.* Moreover, it is "clear that the statute's purpose is to level the playing field but no more." *Id.* 8. "In § 1077, leveling the playing field is tantamount to allowing the hospital service district to form joint ventures *just as any other corporations can*, not to allowing formation of joint ventures that with any other lineage would be anticompetitive." *Id.* (emphasis added). In short, the "abundant indications" are that the State's policy is to *support* competition in the relevant market—not to displace it. *Id.* (quotation omitted).

The Court of Appeals distinguished the *Martin* decision, by which the initial panel felt bound. That case involved "a statutory grant of authority to a hospital board" in Mississippi that, among other things, "operated under a certificate of necessity by which the State of Mississippi expressed its intent that its creature be a sole supplier of a medical service," a fact on which the *Martin* panel expressly relied. *Id.* 10; *see Martin*, 86 F.3d at 1400 (explaining that "state's certificate of need program necessarily displaces unfettered competition" in the relevant market); *id.* at 1399 (same). Louisiana law places no such over-arching regulatory controls over the hospital services market. "*Martin* read at its best drew upon the complete context of the [Mississippi] legislation, including the role of a certificate of necessity." Pet. App. 10.[5] The

[5] The court's emphasis on the certificate of need program in *Martin* accords with the treatment of such programs by other courts. *See, e.g., FTC* v. *Hospital Bd. of Dirs. of Lee Cty.*, 38 F.3d 1184, 1192 (11th Cir. 1994) (state's adoption of certificate of need program supported conclusion that "anticompetitive conduct was reasonably anticipated"); *North Carolina ex rel. Edmisten* v. *P.I.A. Asheville, Inc.*, 740 F.2d 274, 277-278 (4th Cir. 1984) (en banc) (North Carolina certificate of need law strongly indicated state

overwhelming contrary evidence that the Louisiana hospital service district law was designed to enhance competition in the relevant market required a different result.

Because the defendants in the *Surgical Care* case were not entitled to state action immunity under this Court's precedents and the Louisiana scheme, the Court of Appeals reversed and remanded the case "for further proceedings." *Id.* 2.

c. Shortly after the en banc decision in *Surgical Care*, the Fifth Circuit issued a decision in the *Richland Parish* case, holding that "[i]n light of the court's recent *en banc* decision in [*Surgical Care*]," the defendants in that case were not entitled to state action immunity either. *Id.* 53. Accordingly, the *Richland Parish* case, too, was reversed and remanded for further proceedings. *Id.* 54.

REASONS FOR DENYING THE WRIT

I. THE UNANIMOUS FIFTH CIRCUIT EN BANC RULING EXPRESSLY RECOGNIZES AND FAITHFULLY APPLIES THIS COURT'S PRECEDENTS.

1. There is no conflict between the Fifth Circuit decisions below and this Court's precedents. The Fifth Circuit quoted verbatim and carefully applied "the 'foreseeable result' test" established by this Court for determining when local government entities are entitled to state action immunity. *See id.* 7. While petitioners attempt to make

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policy to displace competition), *cert. denied*, 471 U.S. 1003 (1985); *see also* Scott D. Makar, *Antitrust Immunity Under Florida's Certificate of Need Program*, 19 Fla. St. U. L. Rev. 149, 150 & n.4 (1991) ("Certificate of need programs impose extensive regulatory controls on entry into health care service markets and on investments in health care facilities.") (citing sources). Petitioners do not suggest otherwise; indeed, they completely ignore *Martin*.

something of unconnected words or phrases plucked from the en banc decision, they all but acknowledge that the court grounded its approach in *Omni* and *Hallie*. *See* Pet. 15 ("the Fifth Circuit purported to derive its * * * view of antitrust immunity from the facts of *Town of Hallie* and *City of Columbia*"). Every member of the en banc court agreed with the result called for under *Omni* and *Hallie*, and—despite petitioners' spin on it—that outcome is right in step with this Court's precedents.[6]

2. Local government entities are not automatically entitled to state action immunity because—unlike States—they are not themselves sovereign. *Omni*, 499 U.S. at 370. Instead, to be cloaked with such immunity, local entities must "demonstrat[e] that their anticompetitive activities were authorized by the *State* pursuant to a state policy to *displace competition* with regulation or monopoly public service." *Hallie*, 471 U.S. at 39 (quotation omitted; emphases added). *See id.* at 44 (state policy to displace competition must be "clearly articulated and affirmatively expressed") (quotation omitted).

In adopting such a policy, a State need not "explicitly permit[] the displacement of competition." *Omni*, 499 U.S. at 372. And—contrary to the suggestion of petitioners (Pet. 16)—the Fifth Circuit specifically recognized as much. *See* Pet. App. 6 (explaining that in *Hallie*

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[6] Petitioners suggest that the outcome in these cases was not clear-cut because the district courts and initial *Surgical Care* panel concluded that petitioners were entitled to immunity. Pet. 20. But those courts each felt obligated to reach that result by the Fifth Circuit's prior *Martin* decision involving Mississippi Law. *See* Pet. App. 17, 28, 47-48, 63. The en banc court—which was not bound by *Martin*—quickly corrected that misunderstanding of *Fifth Circuit* law. *Id.* 10. Presumably, that explains why each member of the initial *Surgical Care* panel *joined* the en banc decision reversing and remanding the case.

municipality was entitled to immunity even though "state statute made no explicit reference to displacing competition"). But, as this Court has held, a State must do more than merely confer the "authority to regulate"; it must legislate in such a fashion that the "suppression of competition is the '*foreseeable result*' of what the state statute authorizes." *Omni*, 499 U.S. at 373 (emphasis added). *See also id.* at 372 ("[*b*]*esides* authority to regulate, * * * the *Parker* defense *also* requires authority to suppress competition") (emphases added); *Hallie*, 471 U.S. at 39. The Fifth Circuit explicitly recognized and applied "th[is] 'foreseeable result' test." Pet. App. 7.

Petitioners seize on the Fifth Circuit's observation in dictum that a "distinction" may be drawn between "a statute that in empowering a municipality [to regulate] necessarily contemplates the anticompetitive activity [at issue] from one that merely allows a municipality to do what other businesses can do." *Id.*; *see* Pet. 14. According to petitioners, this observation—in and of itself—has the effect of "convert[ing] this Court's 'foreseeability' test into a far more stringent requirement." Pet. 14. This conclusion would surely come as a surprise to the Fifth Circuit—which specifically embraced "the 'foreseeable result' test." Pet. App. 7. But, in any event, this distinction follows naturally from *Omni* and *Hallie*, not to mention application of simple common sense.

In *Omni* this Court held that the State had adopted a policy to displace competition by authorizing municipalities "to regulate the size, location, and spacing of billboards," since "[t]he very purpose of [such] zoning regulation is to displace unfettered business freedom in a manner that *regularly* has the effect of preventing normal acts of competition, particularly on the part of new entrants." 499 U.S. at 371, 373 (emphasis added). *See LaSalle Nat'l Bank* v. *County of DuPage*, 777 F.2d 377,

383 (7th Cir. 1985) ("[b]y definition zoning * * * engrafts upon laissez-faire capitalism a regulatory scheme controlled by political institutions"), *cert. denied*, 476 U.S. 1170 (1986).[7] The Louisiana statutes here, by contrast, merely authorize municipalities to *participate* in a particular market.

Similarly, *Hallie* involved a challenge to a city's refusal to provide sewage services to surrounding areas unless the areas agreed to be annexed. In asserting state action immunity, the city relied upon a state statute giving municipalties the authority to "provide sewage services and also to determine the areas to be served." 471 U.S. at 42. In light of this statute, the Court had little difficulty in concluding that the challenged anticompetitive conduct—monopoly control over sewage services—was foreseeable, and that the statutes evinced a "state policy to displace competition with regulation in the area of municipal provision of sewage services." *Id.* at 44. As in *Omni*, it was "clear that anticompetitive effects *logically would* result from this broad authority to regulate" activities in the relevant market. *Id.* at 42 (emphasis added).

As the Fifth Circuit recognized (Pet. App. 7-8), the Louisiana statutory scheme at issue here is worlds removed from the statutes in *Omni* and *Hallie*. The Louisiana hospital service district law does not purport to confer upon municipalities *any* regulatory authority over the pertinent market (like the statutes in *Omni* and *Hallie*), nor does it begin to sanction what amounts to monopoly public service (like the statute in *Hallie*).

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[7] Petitioners argue that "not *all* zoning is anticompetitive." Pet. 15 (quotation omitted; emphasis in original). Perhaps. But zoning —unlike ordinary commercial activities such as contracting—"*regularly* has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni*, 499 U.S. at 373 (emphasis added).

Rather, it simply authorizes municipalities to engage in commercial activities routinely undertaken by private firms doing business in the same market. When exercised, this authority does not logically or foreseeably "displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Omni*, 499 U.S. at 373. Quite the contrary. The foreseeable result of the Louisiana statutory scheme is that public hospitals will *compete*, not that they will displace competition by or with others.[8]

Petitioners are also wrong in claiming that the Fifth Circuit held that local government entities are only entitled to state action immunity "when state law [specifically] provides for the 'displacement of competition.'" Pet. 16. The Court of Appeals not only eschewed such an approach, but went out of its way to say that "courts will *not* police states to insist that its legislatures use words federally dictated" and that, instead, "[w]e will find a purpose to insulate local government when language and context *fairly* locate a state policy to displace competition." Pet. App. 9 (emphases added). Quite apart from requiring Louisiana to use a magical phrase,

[8] As the Fifth Circuit recognized (Pet. App. 7-8), there is nothing inherently anticompetitive about contracting. Firms may always seek to enter into anticompetitive contracts, but contracting authority—unlike zoning authority—does not have as its "very purpose" the displacement of "unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Omni*, 499 U.S. at 373. As the commentators on which petitioners themselves rely put it, there is no more reason to foresee that a statute authorizing a municipality "to contract" will result in contracts that violate the antitrust laws than there is to foresee that such a statute will result in contracts that "involve[] unlawful race discrimination, fraud, or embezzlement." I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 225, at 454 (1997).

the Court of Appeals merely gave effect to the State's express intent to promote competition in the relevant market.

3. Even if the Fifth Circuit had strayed from this Court's teachings—which it did not—there would be no need for this Court's intervention here. However the state action immunity test is articulated, petitioners cannot meet it under the facts here. The touchstone of state action immunity is the existence of a "state policy to *displace* competition" in the relevant market. *Hallie*, 471 U.S. at 39 (emphasis added). *See Omni*, 499 U.S. at 372 ("the *Parker* defense * * * requires authority to *suppress* competition—more specifically, clear articulation of a state policy to authorize anticompetitive conduct") (emphasis added; quotation omitted). Louisiana has expressly adopted precisely the *opposite* policy in the market for health care services. *See supra* at 3-5.

Petitioners quibble with the Fifth Circuit's reading of Louisiana law. *See* Pet. 18-19. But there is nothing cert-worthy about that and, in any event, they are wrong. As the Fifth Circuit concluded, Section 1071's statement of purpose extends to Section 1077 as well as Sections 1072-76. *See* Pet. App. 8.[9] The Fifth Circuit did not—and did

[9] Because Section 1077 was enacted one year after Sections 1071-76, petitioners suggest that Section 1077 should be interpreted without regard to Section 1071. *See* Pet. 18-19. But Section 1077 was obviously enacted in the same vein as Sections 1071-76. Indeed, Sections 1071-77 all fall under the same heading of title 46 of the Louisiana Code—"Part II. *Competition*" (emphasis added)—and, in discussing the powers that public hospitals needed "to compete" on "equal[]" terms with private hospitals, Section 1071 specifically states that private hospitals "are contracting to engage in economic joint ventures * * * to offer integrated health care services." La. Rev. Stat. § 46:1071. Moreover, under Louisiana law, "[l]aws on the same subject matter must be interpreted in reference to each other." La. Civ. Code art. 13. *See also Malone* v. *Cannon*, 41 So. 2d 837, 843 (La. 1949) ("It is a well established rule that in the construction of a particular statute, or in the interpretation of its

not have to—read the word "equally" to mean "identically," as petitioners suggest. Pet. 19. The court merely concluded that "the word 'equally' qualifies 'effectively,' making clear that the statute's purpose is to level the playing field but no more." Pet. App. 8.[10] Any other reading would defy the statute's plain meaning. As the Fifth Circuit concluded—in light of the statute's declared purpose to enhance competition, and delegation of ordinary business powers to achieve that result—the " 'notwithstanding any other law to the contrary' " clause is far too cryptic to evince a state policy to displace competition. *Id.* (quoting La. Rev. Stat. § 46:1077).

4. The Court should see through petitioners' "federalism" waving. *See* Pet. 2-3, 14, 30. While the state action immunity doctrine is rooted in principles of federalism and state sovereignty, those principles are not directly implicated when, as here, immunity is asserted by local government entities. More to the point, those principles counsel in favor of respecting—not disregarding—state

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provisions, all statutes relating to the same subject * * * should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another.").

[10] The statutory scheme also supports this construction. In 1984 Louisiana found that private hospitals—subject to the antitrust laws—"are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public," and that "this increasing competition is forcing [such private providers] to develop market strategies and strategic plans to effectively compete." La. Rev. Stat. § 46:1071. Thus, it amended the hospital service district law to give public hospitals the authority to engage in the same business acts—*i.e.*, the authority to contract and enter into joint ventures (Section 1077) and to adopt market strategies and strategic plans (Section 1073)—"to enhance the ability of a hospital service district to compete effectively and *equally* in the market for health care services." *Id.* (emphasis added). The "other inherent disadvantages under which public hospitals [supposedly] operate" are entirely of petitioners' own creation, Pet. 19-20; they are nowhere mentioned in the statute.

law. As this Court has emphasized, federal courts must demand "real compliance" with the "foreseeable result" test "to make clear that *the State* is responsible for the [anticompetitive conduct] it has [allegedly] sanctioned and undertaken to control." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (emphasis added). Otherwise, the federal courts would be "compel[ling] a result that the States do not intend but for which they are held to account." *Id.* That is the precise result petitioners demand here, and the Fifth Circuit—following this Court's teachings—properly declined to take their bait.[11]

II. THERE IS NO GENUINE CONFLICT BETWEEN THE DECISIONS BELOW AND THOSE OF ANY OTHER CIRCUIT.

Petitioners' laborious efforts to establish a circuit conflict also fail. Petitioners have not—and cannot—point to a single decision from another circuit finding state action immunity in which the underlying statutory scheme so plainly evinces an intent to enhance competition in the relevant market, as the Louisiana statutes do here. The different outcomes in the decisions below and the decisions to which petitioners point from other circuits are not attributable to any doctrinal divide on the application of the state action immunity doctrine, but rather to discrepancies in the underlying statutory schemes. Moreover, because a municipality claiming state action immunity "must demonstrate that it is engaging in *the challenged activity* pursuant to a clearly expressed state policy,"

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[11] As the Fifth Circuit put it: "To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." Pet. App. 9-10.

Hallie, 471 U.S. at 40 (emphasis added), even the same state statutory scheme could yield different immunity outcomes depending on the particular anticompetitive conduct challenged. There is no conflict.

1. Most decisions cited by petitioners are distinguishable in that the state statutes held to confer immunity did not simply permit public hospitals to engage in ordinary commercial activities like contracting, but rather specifically authorized hospitals to engage in the precise anticompetitive conduct at issue—*e.g.*, denying staff or practice privileges. *See, e.g., Crosby* v. *Hospital Auth. of Valdosta & Lowndes Cty.*, 93 F.3d 1515, 1533 (11th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1386 (11th Cir. 1993); *Coastal Neuro-Psychiatric Assocs., P.A.* v. *Onslow Mem'l Hosp., Inc.*, 795 F.2d 340, 341-342 (4th Cir. 1986). In the cases below, by contrast, petitioners rely on general grants of authority to undertake ordinary commercial activities—such as contracting or advertising—to engage in a wide array of anticompetitive acts that are by no means directly authorized by state law.

2. *FTC* v. *Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), is closer but still distinguishable. In that case, the Eleventh Circuit held that delegation of "extensive authority to operate, control, and maintain a public hospital" conferred upon a public hospital state action immunity from a suit challenging the hospital's anticompetitive acquisition of another hospital. *Id.* at 1188; *see id.* at 1191. Petitioners claim that the Florida statute in *Lee County* is "indistinguishable from the Louisiana [hospital service district] law." Pet. 22. Not so. To name just one discrepancy: unlike the Louisiana statutory scheme, the delegation of authority to operate public hospitals in the Florida statute was *not* ac-

companied by an express intent on the part of the state to promote competition on equal terms in the market for health care services. That distinction is itself outcome determinative.

Lee County is also distinguishable in that, as the Fifth Circuit explained, "[i]n finding antitrust immunity, the [Eleventh Circuit] emphasized that when the legislature authorized a hospital to acquire other hospitals, it already knew that the hospital was a monopoly." Pet. App. 9. *See* 38 F.3d at 1192 ("In 1987, the legislature, with the knowledge that it had given the Board the power to create a monopoly in 1963, further expanded the implicit power of the Board to acquire other hospitals. Thus, * * * the legislature must have reasonably anticipated that further acquisitions, resulting from the 1987 legislation, would increase the Board's market share in an anticompetitive manner."[12] "That is," as the Fifth Circuit put it below, "the polar opposite of this case, in which the state sought to eliminate a competitive disadvantage suffered by the public hopsital and instead establish a market in which the hospital could compete on equal terms." Pet. App. 9.

Petitioners go to great lengths to establish that the Fifth Circuit has adopted a different standard than the Eleventh

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[12] Petitioners claim that the Eleventh Circuit has not subsequently considered whether "the relevant state law regulated a pre-existing monopoly." Pet. 25. But that is beside the point. The court of appeals expressly relied on this fact in deciding *Lee County*, the principal decision on which petitioners ground their claim of a circuit conflict. And, as the *Lee County* court explained, the legislature "must have reasonably anticipated that further acquisitions" would only increase the hospital's monopoly power. 38 F.3d at 1192. That the challenged anticompetitive conduct in *Lee County* involved the acquisition of another hospital also distinguishes it from the cases below, which involve anticompetitive conduct of a much different stripe.

Circuit for determining when municipalities are entitled to state action immunity. *See* Pet. 22-24. But the en banc Fifth Circuit, for one, does not agree with that assessment. *See* Pet. App. 9 ("The [Eleventh Circuit]'s application of its foreseeability test * * * is broadly *consistent* with the result here.") (emphasis added). And it does not follow from *Lee County;* indeed, there the Eleventh Circuit specifically "recognize[d] that there must be some showing that the anticompetitive results were more than merely plausible." 38 F.3d at 1191 n.6 (quotation omitted).[13] Mere plausibility is all that can be shown from the statutory scheme here, except that the same scheme expressly states that the delegated business authority should be exercised in a *competitive* rather than monopolistic fashion.

3. The asserted conflict does not fare any better in the case of *Coastal Neuro-Psychiatric Assocs., P.A.* v. *Onslow Memorial Hospital, Inc., supra.* As the Fifth Circuit recognized (Pet. App. 8-9), in *Coastal Neuro* the Fourth Circuit held that public hospitals were entitled to state action immunity in restricting physician privileges pursuant to a statute "giv[ing] hospitals the power to determine which physicians may practice with them." 795 F.2d at 341. In reaching that result, the Fourth Circuit specifically relied on the regulatory character of the authority being ex-

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[13] This categorical statement belies petitioners' citation to *Bankers Insurance Co.* v. *Florida Residential Property & Casualty Joint Underwriting Ass'n,* 137 F.3d 1293 (11th Cir. 1998), for the proposition that in the Eleventh Circuit the foreseeable result test is satisfied as long as the statutory authority may conceivably be exercised in an anticompetitive fashion. *See* Pet. 25. In any event, *Bankers Insurance*—which is not a public hospital case at all—is readily distinguishable from the cases here in that the Eleventh Circuit there concluded that "the legislature *explicitly* contemplate[d]" that the local government entity would engage in the challenged anticompetitive conduct, and in that the same entity "was not created to compete in" the relevant market. 137 F.3d at 1297-98 (emphasis in original).

ercised in an anticompetitive fashion. *See id.* at 342 ("The North Carolina legislature must have foreseen this anticompetitive consequence and decided that the *regulatory* benefits conferred by the statute simply outweighed it.") (emphasis added). In that regard, the North Carolina provision at issue in *Coastal Neuro* is much closer to the statutory schemes in *Omni* and *Hallie*—which gave local governmental entities broad regulatory authority over the pertinent markets—and is entirely different from the Louisiana statutes here—which, as discussed, simply authorize hospital service districts to act as commercial participants in the health care services market.[14]

4. The case that comes closest to the facts here is *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), and—as petitioners themselves acknowledge—the court there "reached the same result as the decisions below." Pet. 21. In *Lancaster Hospital* the Ninth Circuit rejected the public hospital's argument that the delegation of "the powers needed to engage in the hospital business," including broad authority to "enter into contracts," conferred state action immunity on the hospital to enter into anticompetitive contracts. *Id.* at 402-403 nn.11-12. As the court explained, "the state has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular [private] competitors." *Id.* at 402 (footnote omitted). "[T]he foreseeable result of [such a] statutory scheme * * * is that [municipalities] will

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[14] Petitioners claim that "Louisiana has granted its municipalities indistinguishable authority [from that granted under the North Carolina statutes] to create and operate hospitals." Pet. 26. But here again, petitioners completely overlook the express intent of the Louisiana scheme to "enhance" competition on "equal[]" terms in the market for health care services, La. Rev. Stat. § 46:1071, a provision completely absent from the North Carolina scheme.

compete, not that they will preclude competition by others." *Id.* at 403 (emphasis added). The same goes for the Louisiana scheme here.

More to the point, like the en banc Fifth Circuit below, the *Lancaster Hospital* court recognized that "we have before us numerous concrete legislative actions that indicate [that the State], instead of making regulation the order of the day in the hospital service sector of the economy, has committed itself to a *competitive* market." *Id.* (emphasis added). In denying state action immunity, the court simply gave effect to that clear intent. None of the other cases on which petitioners rely in attempting to establish a circuit conflict involved such an obvious effort on the part of the State "to enhance competition rather than replace it" in the health care services market. *Id.* That is a complete answer to petitioners' claim that the circuits are in conflict in any way implicated by the decisions below.[15]

III. THE PETITION IS A SINGULARLY ILL-SUITED VEHICLE TO ADDRESS ANY OF THE BROADER DOCTRINAL ISSUES RAISED BY PETITIONERS.

While petitioners posit that the state action doctrine is in a state of intolerable disarray, none of the lower court decisions on which they rely recognizes any such confusion, and the entire Fifth Circuit below unanimously

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[15] In *Redwood Empire Life Support* v. *County of Sonoma*, —— F.3d ——, 1999 WL 700577 (9th Cir. Sept. 10, 1999), the Ninth Circuit held that the County of Sonoma was entitled to state action immunity for an exclusive ambulance services contract entered into with a private firm. But as the court emphasized, the underlying state statute there—governing emergency medical care—specifically "explains that the California Legislature, by enacting [the Act], intended to confer state action immunity from federal antitrust laws for actions taken by local governmental entities under [the Act]." *Id.* at *1. The statute involved in *Lancaster Hospital* contained no such provision.

agreed on the result called for by *Omni* and *Hallie* here. The fact that some scholars regard state action immunity as a "difficult issue for the Court, and thus for those who follow it," Pet. 29 (quotation omitted), does not suffice under the standards that typically govern the grant of certiorari, *see* S. Ct. Rule 10; if it did, those standards would be seriously relaxed, given the variety of "difficult issues" with which this Court regularly deals. At most, petitioners have offered the trappings of a law review article, not an issue warranting plenary review by this Court.

Even if there were a need for further guidance on the application of the "foreseeable result" test, this case would be a singularly inappropriate vehicle for providing such guidance. As discussed, the decisions below are firmly grounded in the specifics of the Louisiana hospital service district law. *See* Pet. App. 7-9. In addition, while petitioners claim the Fifth Circuit "ruled with an exceedingly broad brush," Pet. 29, the en banc court pointedly admonished that "courts will *not* police states to insist that its legislatures use words federally dictated" and that, instead, "[w]e will find a purpose to insulate local government when language and context *fairly* locate a state policy to displace competition." Pet. App. 9 (emphasis added). *See also id.* 4 ("a state may express its will as it prefers").

Finally, if the decisions below *do* have the unsettling effect hypothesized by petitioners, this Court may still review them later. The interlocutory posture of the decisions below provides yet another reason for denying the present petition. *See Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for writ of certiorari).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

(3)

No. 99-210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

Hospital Service District No. 1 of Tangipahoa Parish, *et al*,

Petitioners,

v.

Surgical Care Center of Hammond,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF PUBLIC HOSPITALS & HEALTH SYSTEMS, IN SUPPORT OF PETITIONERS

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25pp

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Public Hospitals & Health Systems (NAPH) was founded in 1981 and currently represents over 100 public and non-profit safety net hospitals and health systems. Safety net hospitals and health care systems are outpatient and inpatient facilities that generally provide a disproportionate share of medical care in their communities to the low-income and hard-to-reach populations in a community, typically persons who are Medicaid-eligible or uninsured. Over 80 percent of services provided by NAPH members are to individuals covered by Medicare, Medicaid, or who are without any private insurance.[2] Almost all NAPH members have an obligation, either explicitly by state statute or otherwise as part of the stated mission of the institution, to provide medical care to all patients in need of care, regardless of insurance status or ability to pay. In 1996, just 66 NAPH members provided nearly one quarter of the uncompensated care in the United States.[3] A substantial majority of NAPH's member hospitals are either directly operated by a city or county, or are part of or are operated by the state, such as a

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[1] This brief was authored solely by counsel for the amicus curiae, National Association of Public Hospitals & Health Systems (NAPH). No person or entity other than NAPH has made a monetary contribution to the preparation or submission of this brief.

Petitioners and respondents have consented to the filing of this brief amicus curiae. Letters expressing consent to that effect have been filed with the Clerk of the Court.

[2] Testimony of Larry Gage, President of the National Association of Public Hospital & Health Systems, before the Senate Comm. on Finance, 106th Cong., 1st Sess. (May 27, 1999) (available on LEXIS Legis library, Cngtst file). A more typical hospital in the United States would have a caseload where nearly 40 percent of its patients are covered by private insurance.

[3] Larry Gage, *et al*, National Ass'n Pub. Hosp. & Health Systems, The Safety Net in Transition: America's Uninsured and Underinsured: Who Cares? 26 (1998).

state university hospital, a hospital district, authority, or a public benefit corporation.

Most safety net providers operate under enormous financial pressures. In recent years the business of health care delivery has witnessed convulsive changes, including very substantial reductions in payment as a result of the increased influence of managed care, increased demand for uncompensated care as the ranks of the uninsured grow, and drastically reduced federal and state support for safety net providers. In addition, a wave of integration, mergers, and consolidations has led to intensified pressures for more cost-efficient methods of delivering health care services.[4] As the number of uninsured Americans increases,[5] safety net providers face an increased demand for free care, especially providers located in urban city centers.[6] States' growing use of managed care for Medicaid recipients has forced safety net providers to compete for a population that represents a predominant source of their revenue, while public and private health insurers alike demand lower costs.[7]

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[4] *See, e.g.*, Robert A. Berenson, *Beyond Competition*, Health Aff., Mar./Apr. 1997, at 171, 173-74; Stephen A. Norton & Debra J. Lipson, The Urban Institute, Public Policy, Market Forces, and the Viability of Safety Net Providers 1 (1998).

[5] The number of uninsured individuals in the United States has increased by over 10 million over the last decade and is currently estimated at 43 million. Robert L. Bennefield, U.S. Dep't of Commerce Economic and Statistics Admin., Current Population Reports: Health Insurance Coverage: 1997 (Sept. 1998); Testimony of Diane Rowland, Executive Vice President of the Henry J. Kaiser Family Foundation and Executive Director of the Kaiser Commission on Medicaid and the Uninsured, before the Subcomm. on Health and the Environment of the House Comm. on Commerce, 106th Cong., 1st Sess. (June 16, 1999) (available on LEXIS, Legis library, Cngtst file).

[6] Norton & Lipson, *supra* note 4 at 5-8. *See also* Paul B. Ginsburg, *The Dynamics of Market-Level Change*, 22 J. Health Pol., Pol'y & L. 363, 375 (1997).

[7] Ginsburg, *supra* note 6 at 366-67, 370-72.

Most NAPH members operate under the authority of the state or a state statute and are likely to enter into exclusive arrangements — the subject of the antitrust challenges below — in an effort to address current cost and efficiency pressures. NAPH and its members thus have a direct interest in the resolution of confusion surrounding the application of the antitrust state action immunity doctrine.

SUMMARY OF THE ARGUMENT

This Court's precedents have made clear that states are immune from federal antitrust liability. *Parker* v. *Brown*, 317 U.S. 341 (1943). This immunity also may extend to local governments, but only when two requirements are met: (1) local government actions must be authorized by state statute, and (2) the anticompetitive effects of the actions must be foreseeable. *See City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991); *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985).

The Fifth Circuit's *en banc* decision below departs from the well settled principles of *City of Columbia* and *Town of Hallie* by adding a requirement that state law must "necessarily contemplate" anticompetitive activity in order to provide local government state action immunity for a public hospital. *Surgical Care Center of Hammond, L.C.* v. *Hospital Service District No. 1 of Tangipahoa*, 171 F.3d 231, 235 (5th Cir. 1999).[8] In imposing this new requirement, the Fifth

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[8] *Surgical Care* reversed the decisions of both a Fifth Circuit panel, 153 F.3d 220 (5th Cir. 1998), and a federal district court, Civ. Action No. 97-1840 Section "D", 1997 U.S. Dist. LEXIS 12043 (E.D. La. Aug. 8, 1997). The Fifth Circuit summarily reversed two other cases on the strength of its *en banc* decision. *Willis-Knighton Medical Center v. City of Bossier City*, 178 F.3d 1290 (5th Cir. 1999)(Table), *rev'g* 2 F. Supp. 2d 842 (W.D. La. 1997); *Abraham v. Richland Parish Hospital Service District* 1-B, No. 98-30487 (5th Cir. 1999), *rev'g* Civ. Action No. 97-760 (W.D. La. May 1, 1998). *The Willis-Knighton* case recently settled, and *Abraham* has been consolidated with *Surgical Care* for the purposes of the petition at issue. All three cases are available in petitioners' submission. Pet. Br. App. 1-68.

Circuit essentially interprets *Town of Hallie*'s requirement that anticompetitive activity be "foreseeable" as instead a requirement that anticompetitive activity be actually "foreseen." To evaluate whether the Louisiana legislature "necessarily contemplated" anticompetitive conduct in this case, the Fifth Circuit went on intrusively to assess the "purpose" of the statute. 171 F.3d at 235.

In creating this requirement, the Fifth Circuit has both articulated an incorrect standard and misapplied this Court's state action immunity precedents in the context of public hospitals. Moreover, the Fifth Circuit's approach aggravates a split in the circuits and has already led to significant confusion for public hospitals. By generating confusion about the scope of actions that can qualify for state action immunity, the decision inhibits public hospitals from pursuing legitimate competitive strategies, increases the likelihood that their actions will face frequent legal challenges, places a financial burden on public hospitals, states and other governmental entities, and imposes precisely the type of burden on state legislatures that the antitrust state action immunity doctrine was intended to avoid. These consequences of the Fifth Circuit's decision are further exacerbated by its failure to address the extent to which Eleventh Amendment immunity may apply to governmental entities such as public hospitals.

NAPH therefore urges the Court to grant the petition for a writ of certiorari. We adopt and incorporate the broader arguments contained in the Petitioners' brief. This *amicus* submission focuses specifically on the Fifth Circuit's decisions as they relate in general to public hospitals and hospital systems operating under similar state statutes. In particular, this brief emphasizes the impact that the failure to grant the petition for a writ of certiorari will have on those hospitals and systems. This impact is quite substantial and weighs in favor of the Court granting the petition.

ARGUMENT

I. The Court Should Grant the Petition Because the Fifth Circuit's Decisions Below are Inconsistent with Prior Decisions of This Court

A. The Fifth Circuit's Interpretation and Application of "Foreseeability" Are Inconsistent with This Court's Prior Decisions

This Court has been very clear in stating that in examining whether anticompetitive actions are "foreseeable," the state statute need *not* "necessarily contemplate" anticompetitive actions.[9] By contrast, the Fifth Circuit in *Surgical Care* proclaimed that there is "a distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do." 171 F.3d at 235. The Fifth Circuit went on to assess whether the Louisiana legislature had foreseen potentially anticompetitive effects in enacting the legislation. *Id.* (assessing whether statutory language had "signals of insulation"). Since the actions addressed by the Fifth Circuit's opinions were clearly authorized under the Louisiana Hospital Service District law,[10] the only question under *Town of Hallie* and *City of Columbia* should have been whether the anticompetitive actions were "foreseeable," not whether they were actually "foreseen."

Viewed under the proper foreseeability criteria, the actions of the hospitals in these cases surely were entitled to immunity. All of the cases at issue in the petition dealt with exclusive

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[9] We incorporate Petitioners' arguments regarding the Fifth Circuit's erroneous application of Supreme Court precedents. Pet. Br. 14-21.

[10] *Surgical Care* addressed contracts authorized under La. Rev. Stat. § 46:1077. 153 F.3d at 233, 235. *Abraham* dealt with an emergency room services contract authorized under La. Rev. Stat. § 46:1077. Pet. Br. App. 62-64.

contractual arrangements.[11] Exclusive arrangements are an increasingly common feature of the health care marketplace. Commentators have noted that exclusive contracts provide important ways for hospitals to improve efficiency and quality of care.[12] These arrangements can allow the hospital efficiencies that may in fact reduce costs. *Jefferson Parish Hospital. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) (Exclusive arrangements "may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships."). Indeed, in a world of increasing managed care, exclusive contracts are a necessary tool for hospitals.[13] Numerous authorities have documented the spread of exclusive contractual arrangements. As one recently stated:

> In the 1980s, hospitals began entering into exclusive contractual arrangements with physicians and physician groups, typically for surgery or hospital-based specialties such as radiology, anesthesiology, and pathology. These arrangements are prompted both by an institutional desire to

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[11] In *Surgical Care*, a competing hospital sued in regard to exclusive managed care contracts for outpatient surgical care. 171 F.3d at 232. In *Abraham*, three physicians sued a public hospital when the hospital, which had an exclusive contract with a company to provide emergency care services, refused to allow them to provide those services. Pet. Br. App. 63-64.

[12] John J. Miles, Health Care & Antitrust Law, § 11:1 (1998).

[13] John D. Blum, *The Evolution of Physician Credentialing into Managed Care Selective Contracting*, 22 Am. J.L. & Med. 173, 199 (1996)("In general, courts have looked favorably on restrictive contracting where procompetitive justifications are present. In fact, commentators have argued that for managed care to work, plans must have the ability to limit physician membership or face market failure." (citation omitted)). *See also* Bryan A. Liang, *An Overview and Analysis of Challenges to Medical Exclusive Contracts*, 18 J. Legal Med. 1, 34 (1997) ("As health care reform continues its presence within the political arena, significant changes in the provider landscape likely will make the exclusive contract a frequently used arrangement in contracting for physician and other health services.").

> enhance quality of care and by the need to introduce efficiencies into key departmental operations, and as such, these arrangements have strong underlying economic motivations. . . . Exclusive contracts are gaining popularity in managed care as plans seek to establish exclusive arrangements with particular physician networks.[14]

Because exclusive arrangements by their nature exclude some providers in favor of others, they have frequently been challenged on antitrust grounds. However, they have only rarely been found to actually violate the antitrust laws.[15] In fact, as one commentator has observed: "[A]lthough numerous such cases have been filed, plaintiffs have not won any reported decision ...."[16] Indeed, neither the Antitrust Division of the Department of Justice nor the Federal Trade Commission has "ever challenged an exclusive contract between a hospital and physicians . . . ."[17]

Given the fact that exclusive contracts are so ubiquitous in health care markets, it was erroneous for the court to find that it was not "foreseeable" that a public hospital would enter into such contracts, especially given that the legislation at issue broadly authorized Louisiana hospital districts to enter into contracts and joint ventures. And given the fact that lawsuits challenging such arrangements are both frequent in number and infrequently successful, it seems even more anomalous to infer that the legislature envisioned subjecting

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[14] Blum, *supra* note 13 at 181 (citations omitted).

[15] *See* David Marx, Jr., & James H. Sneed, American Health Lawyers Ass'n, Antitrust & Healthcare: Meeting the Challenge 230 (2d ed. 1998) ("Challenges to exclusive contracts both in the healthcare field and otherwise have generally not been successful."); Blum, *supra* note 13, at 182 ("By and large courts have upheld the validity of exclusive contracts ....").

[16] Miles, *supra* note 12, § 11:1, at 11-6 to 11-8 (regarding suits by physicians against hospitals).

[17] *Id.* at 11-9.

public hospitals to extensive lawsuits for these activities. Yet that is the anomalous result produced by the Fifth Circuit's decisions below.

The Fifth Circuit's determination that anticompetitive activities were not foreseen and that the purpose of the Louisiana Hospital Service District law was merely to "level the playing field" is also erroneous given the health care market context in which public hospitals operate. Public hospitals must be viewed as one part of a broader state scheme designed to address the state's health care needs. As noted above, public hospitals are typically obligated to provide medical care to all patients regardless of their insurance status or ability to pay — a mission that is becoming increasingly difficult to pursue. Public hospitals are subject to numerous governmental restrictions, including open meeting requirements, civil service requirements, and restrictions on procurement, budgetary flexibility, access to capital, and strategic planning. The public status of a hospital constitutes a substantial constraint on its ability to compete in today's highly competitive health care marketplace and succeed in its mission.

To infer that comparatively small changes in the contracting powers of public hospitals in Louisiana were intended to "level the playing field," as the Fifth Circuit did, ignores this larger context. If the state *truly* wanted to level the playing field, it would *privatize* the public hospitals, leaving them with no obligations and no restrictions greater than those faced by private hospitals. To the contrary, selectively reducing the disadvantages of public hospitals by enhancing their authority to contract and enter into joint ventures evinces a determination on the part of the state to continue the regulated and publicly supported status of the institutions, and thus to continue to treat public and private hospitals differently. It is quite unlikely that the same legislature could have contemplated that these marginal expansions of public hospital contracting authority would remove state action immunity from its public hospitals,

especially given the disruptive impact increased antitrust exposure would have on public hospitals struggling to meet unmet public health needs.

B. The Fifth Circuit Failed to Consider the Relevance of Sovereign Immunity Under the Eleventh Amendment

The Fifth Circuit's decision in *Surgical Care* contained only the briefest discussion of the Eleventh Amendment, noting that Eleventh Amendment immunity is "arguably a secondary source of protection for states from the federal antitrust laws." *Surgical Care*, 171 F.3d at 234.[18] However, the Eleventh Amendment is a *primary*, not a secondary, source of immunity for the states and their hospitals. When a state entity, or an entity that is viewed as a state agent, has an Eleventh Amendment defense to a federal antitrust claim, it presents a jurisdictional question, viz., can the state entity be subject to suit? In contrast, the question of whether an entity is immune from a federal antitrust challenge under the state action doctrine is a question of substantive law. Thus, courts should be obligated to determine whether Eleventh Amendment immunity applies as a jurisdictional issue before considering the merits of the case, including the applicability of the antitrust state action doctrine. *See, e.g., United States ex rel. Foulds* v. *Texas Tech University*, 171 F.3d 279, 288-89 (5th Cir. 1999), *petitions for cert. filed* 68 U.S.L.W. 3138 (U.S. Aug. 23, 1999)(No. 99-321), 68 U.S.L.W. 3153 (U.S. Aug. 27, 1999) (No. 99-365), (U.S. Aug. 27, 1999) (No. 99-513).

NAPH has a particular interest in the Court clarifying that an Eleventh Amendment jurisdictional analysis is a necessary prerequisite to any application of antitrust state

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[18] The court in *Surgical Care* did not offer any analysis or rule on the matter in part because the defendant was a local governmental entity. 171 F.3d at 234. The hospital district in *Surgical Care* does not appear to be asserting Eleventh Amendment immunity.

action immunity analysis, given that some courts have found Eleventh Amendment immunity to apply to state university hospitals. *Texas Tech University*, 171 F.3d at 289 n.14 (finding Texas Tech University Health Sciences Center "cloaked" with sovereign immunity as state institution); *Neo Gen Screening* v. *New England Newborn Screening Program*, No. 99-1100, 1999 U.S. App. LEXIS 17392 *8-9 (1st Cir. July 14, 1999) (finding University of Massachusetts' program for conducting genetic screening of newborns an arm of state because of University's mission, governance, financial relationship to state, and other factors); *Pharmaceutical & Diagnostic Services, Inc. v. University of Utah*, 801 F. Supp. 508, 510-13 (D. Utah 1990) (finding University of Utah's Colleges of Pharmacy and Medicine and its Intermountain Radiopharmacy arms of state for Eleventh Amendment purposes). As noted above, some of NAPH's members are state university institutions or have close state supervision.[19]

The Court's recent decisions on sovereign immunity have brought clarity and consistency to Eleventh Amendment jurisprudence. In *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), this Court endorsed a two-part inquiry for determining when Congress has validly abrogated the States' sovereign immunity under the Eleventh Amendment. Under the first prong, Congress' intent to abrogate the states' Eleventh Amendment immunity must be "unmistakably clear" from the language of the statute in order for the legislation to have that effect. *Id.* at 56 (quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989)). A general authorization that a suit may be brought in federal court is not a sufficient expression of Congress' intent to abrogate Eleventh Amendment immunity. *Id.* Under the second prong, Congress must have acted pursuant to a valid exercise of power. *Id.* at 55. To

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[19] See the discussion of the Westchester County Health Care Corporation, *infra* II, for an example of a local public hospital authorizing statute where the state's governor appoints over half of the governing board.

date, the Court has recognized only one source of power as sufficient to abrogate Eleventh Amendment immunity: the enforcement clause (§ 5) of the Fourteenth Amendment, U.S. Const. amend. XIV, § 5. *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199, 2205-06 (1999) (*Florida Prepaid*); *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2224-25 (1999); *Seminole Tribe*, 517 U.S. at 59.

Under these recent decisions, it is almost certain that the Sherman Act, which was enacted by Congress pursuant to the Commerce Clause, *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 11-15 (1895), would not pass the second prong of the *Seminole Tribe* test. This is particularly true since the Court squarely rejected the Commerce Clause as a sufficient source of power for Congress to abrogate Eleventh Amendment immunity when it overruled *Union Gas*. *Pennsylvania* v. *Union Gas*, 491 U.S. 1, 17, 19-20 (1989)(holding that Interstate Commerce Clause gave Congress power to abrogate states' sovereign immunity), *overruled by Seminole Tribe*, 517 U.S. at 66. It is also likely that the Sherman Act would not pass the first prong. *See Parker* v. *Brown*, 317 U.S. at 350-51 (noting no suggestion of purpose in Sherman Act to restrain state action). Granting the petition for certiorari in this case would allow the Court to clarify that all inquiries under the antitrust state action doctrine must be preceded by a threshold determination that the Eleventh Amendment is inapplicable.

II. The Court Should Grant the Petition to Resolve the Profound Conflict Among the Circuits and Confusion Caused by the Fifth Circuit's Decision

The language of the Louisiana Hospital Service District law differs very little from the statutory language interpreted in cases decided by other circuits in which state action

immunity has been sustained.[20] The Fifth Circuit decision thus aggravates the existing conflict among the circuits. *See* Pet. Br. 21-28.

Because of the fundamental similarities between the Louisiana HSD law and other statutes governing public hospitals, the Fifth Circuit decisions create substantial confusion for public hospitals. In this section, we discuss three representative statutes that govern the activities of NAPH members as examples of statutes that provide authority similar to the Louisiana Hospital Service District law.[21] Two of the three statutes have been examined by the courts and were found sufficient to cloak the public hospital action in immunity.[22] This comparison illustrates that the confusion

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[20] Petitioners compare the Fifth Circuit decision to the decisions of the Ninth Circuit in *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991)(addressing state action immunity in context of alleged antitrust violation by California hospital district in regard to contracts under its contracting authority), *cert. denied*, 502 U.S. 1094 (1992), the Eleventh Circuit in *F.T.C.* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184 (11th Cir. 1994)(addressing state action immunity in context of alleged antitrust violation by special act public hospital pursuant to its joint venture and acquisition authority) and the Fourth Circuit in *Coastal Neuro-Psychiatric Associates* v. *Onslow Memorial Hospital*, 795 F.2d 340, 342 (4th Cir. 1986)(addressing state action immunity in context of alleged antitrust violation by county hospital authority in regard to exclusive contract and authority to grant physician privileges). As the Petitioners note, there is no relevant distinction that can be made regarding whether the potentially anticompetitive actions at issue in the cases were more or less foreseeable under the statutes in each case.

[21] The Louisiana HSD law stated that the hospital service district "may contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital service." La. Rev. Stat. 46:1077. This language is similar to language in many other public hospital authorizing statutes.

[22] Both of these cases arose out of exclusive contracts by public hospitals under general contracting authority, similar to the Fifth Circuit cases. Many of the cases that have been filed against public hospitals regarding antitrust disputes arise in this context. *See, e.g.*, *Scara* v. *Bradley Memorial Hospital*, CIV-1-98-28, 1993 U.S. Dist. LEXIS 19908

caused by the conflict in the circuits has very real consequences for public hospitals throughout the United States, whether they are located inside or outside the Fifth Circuit, or in a circuit that has or has not explicitly addressed the issue. Public hospitals have (1) little ability to know whether they face potential lawsuits when arranging exclusive

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(E.D. Tenn. Feb. 4, 1993) (finding immunity in suit by physician denied anesthesiology privileges because public hospital had exclusive contract with Cleveland Anesthesiologists to provide such services); *Central Florida Clinic for Rehabilitation* v. *Citrus County Hospital Board*, 738 F. Supp. 459 (M.D. Fla. 1989) (finding immunity in lawsuit by a competing corporation claiming that an agreement between the public hospital and a third party was an attempt to monopolize patient therapy services), *aff'd without op.*, 888 F.2d 1396 (11th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

Other lawsuits challenging similar arrangements have been analyzed under the public hospital's authority to make staffing decisions or grant privileges. *See, e.g.*, *Crosby* v. *Hospital Authority of Valdosta and Lowndes County*, 93 F.3d 1515 (11th Cir. 1996) (finding immunity in lawsuit by physician denied orthopedic surgical staff privileges), *cert. denied*, 520 U.S. 1116 (1997); *Coastal Neuro-Psychiatric Associates* v. *Onslow Memorial Hospital*, 795 F.2d 340 (4th Cir. 1986) (finding immunity in denial of privileges to radiologists based on exclusive contract with in-house physicians); *Wee* v. *Rome Hospital*, 93-CV-894 (FJS), 1996 U.S. Dist. LEXIS 5185 (N.D.N.Y. Apr. 15, 1996) (finding immunity in suit by physician relating to peer review process that resulted in loss of physician staff privileges); *Daniel* v. *American Board of Emergency Medicine*, 988 F. Supp. 127 (W.D.N.Y. 1997) (finding immunity (except where waived) for public teaching hospital defendants in a number of states in suit alleging antitrust violations in staffing practices regarding qualifications for certification examination for emergency physicians); *Shaw* v. *Phelps County Regional Medical Center*, 858 F. Supp. 954 (E.D. Mo. 1994) (finding immunity in termination of physician's privileges based on Board resolution to bring all anesthesiology services in-house); *Cohn* v. *Wilkes General Hospital*, 767 F. Supp. 111 (W.D.N.C. 1991) (finding immunity in denial of privileges); *Hatch* v. *North Colorado Medical Center*, Civ. Act. No. 85-F-2148, 1986 U.S. Dist. LEXIS 27631 (D. Co. Mar. 26, 1986) (finding immunity in suit by physician regarding denial of surgical privileges). Courts have almost always recognized antitrust immunity for public hospitals under the state action doctrine in either situation. Relitigation of these issues in both contexts may be the result of the Fifth Circuit's decision.

contracts with physician groups or others, and (2) may validly fear relitigation of issues already thought to be settled. The confusion may be magnified for public hospitals in circuits where the circuit court has not yet directly addressed public hospital immunity. Without review by the Supreme Court, an increasing number of lawsuits is probable, with increasingly inconsistent results.

Mississippi

Despite the fact that Memorial Hospital of Gulfport (MHG) has already engaged in protracted litigation to confirm that it has antitrust state action immunity under Mississippi's public hospital statute, there is a significant risk that a future antitrust action in Mississippi could rely on *Surgical Care* to reach an opposite result.

MHG, a member of NAPH owned jointly by the City of Gulfport and the Gulfport-West Harrison County Hospital District, was a defendant in an antitrust lawsuit filed in 1990 challenging the hospital's decision to deny a physician the right to perform chronic dialysis in the hospital's end stage renal disease (ESRD) units, based on an existing exclusive contract for the ESRD units with another physician. The United States District Court for the Southern District of Mississippi denied the hospital's motion for summary judgment claiming state action immunity. *Martin* v. *Memorial Hospital at Gulfport*, 881 F. Supp. 1087 (S.D. Miss. 1995). The Fifth Circuit reversed, finding that the public hospital was immune based on the state action immunity doctrine. *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996).

Applying *Town of Hallie* and *City of Columbia*, the Fifth Circuit found a sufficient indication that anticompetitive conduct was foreseeable in the contracting authority of the hospital. 86 F.3d at 1399. Under Miss. Code Ann. § 41-13-35, the board of trustees was authorized generally to "contract ... with ... any individual, partnership, corporation, ... or other health care facility, for the providing of property,

equipment or services by or to the community hospital or other entity or regarding ... operation of the community hospital ... and to terminate said contracts when deemed to be in the best interest of the community hospital." 86 F.3d at 1399 n.1 (quoting Miss. Code Ann. § 41-13-35(5)(g)).

Although the Fifth Circuit in *Surgical Care* attempted to distinguish *Martin* by emphasizing the existence of a certificate of need (CON) statute in Mississippi, there is nothing about the existence of a CON statute that indicates that potentially anticompetitive exclusive contracts were "foreseen" by the legislature, as opposed to being "foreseeable." There is nothing else in the community hospital statute that would indicate that the Mississippi legislature "necessarily contemplated" potentially anticompetitive actions.[23] *Surgical Care*, by reversing course from *Martin*, could spur new challenges in Mississippi. Thus MHG and other similarly situated public hospitals may once again face costly litigation.

Minnesota

The Fifth Circuit also creates confusion in other parts of the country where the courts had already found public hospital immunity in similar situations. In *Bloom* v. *Hennepin County*, 783 F. Supp. 418 (D. Minn. 1992), Hennepin County Medical Center (HCMC), an NAPH member owned and operated by Hennepin County, had an exclusive contract with a nonprofit corporation, Hennepin Faculty Associates (HFA), to provide all physician services at HCMC. A physician, upon being terminated from employment with HFA and subsequently denied privileges to see patients at HCMC, sued HCMC, HFA, Hennepin County,

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[23] In fact, the Fifth Circuit panel in *Surgical Care* was unable to distinguish the two statutes. *Surgical Care Center of Hammond, L.C.* v. *Hospital District No. 1 of Tangipahoa Parish*, 153 F.3d 220, 223 (5th Cir. 1998) ("This broad statutory language parallels the language we deemed sufficient to confer immunity in *Martin* ...."), *rev'd*, 171 F.3d 231 (5th Cir. 1999) (en banc).

the County Board of Commissioners, and others, claiming antitrust violations, breach of contract and other claims. 783 F. Supp. at 422. HCMC, which is operated under the authority of the Hennepin County Hospital Act, claimed antitrust immunity based on the state action doctrine. The main statute relied on by HCMC in its defense was a statute that allowed the Hennepin County Board of Commissioners to establish a department "for the purpose of providing comprehensive health care and related services as required by law and as determined . . . to be in the best interest of the county." 783 F. Supp. at 424 (quoting Minn. Stat. § 383B.211).

Correctly applying *Town of Hallie* and *City of Columbia*, the federal district court relied on the statute cited by the hospital, as well as other general authority allowing the county to provide services in the best interests of the county, to find that anticompetitive actions were foreseeable. 783 F. Supp. at 425 (citing Minn. Stat. § 383B.217[24]). The court stated that "[a]ny restraint on trade flowing from contracts entered into by HCMC is a necessary and reasonable consequence of the exercise of its statutory authority to contract for services, thus giving rise to an inference that state policy favors such displacement of competition." *Id.*

In *Bloom*, the court found HCMC's actions in regard to an exclusive contract for physician services to be immune under the state action doctrine by examining general authority regarding the provision of health care services. However, it is unclear whether the statute could pass the Fifth Circuit's

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[24] This statute states, in relevant part, that "Hennepin county may establish a medical center to provide hospital and medical services to the general public, including the indigent as defined by state and federal law, and as determined by the county board, and may provide for health education and training, and research, and may provide for other service as the board of commissioners determines, by resolution, to be in the best interests of the county...." Minn. Stat. § 383B.217(1). The statute also permits contracting and purchasing of "goods, materials, supplies, equipment and contracted services." Minn. Stat. § 383B.217(7)(a).

"necessarily contemplated" test. Since the Eighth Circuit has not addressed this issue, other public hospitals in the Eighth Circuit may be uncertain of what their statutes permit and which standard should apply. This uncertainty is likely to encourage lawsuits which will either result in further confusion regarding the continued relevance of *Bloom* or further aggravate the existing conflict between the circuits.

New York

The Fifth Circuit's decision will also cause uncertainty in circuits that have not yet addressed a particular piece of authorizing legislation. The Westchester County Health Care Corporation, a public benefit corporation in Westchester County, New York, and an NAPH member, is authorized by the Westchester County Health Care Corporation Act. N.Y. Public Auth. Law § 3300 *et seq.* Over half of the governing board of the Westchester County Health Care Corporation is appointed by the governor. N.Y. Public Auth. Law § 3303(1)(b).[25] The Act explicitly authorizes the corporation to "provide health and medical services for the public directly or by agreement or lease with any person, firm, or private or public corporation or association . . . ," N.Y. Public Auth. Law § 3306(2), and to "determine the conditions under which a physician may be extended the privilege of practicing within a health facility." N.Y. Public Auth. Law § 3306(6). There is no indication of whether the legislature contemplated anticompetitive conduct anywhere in the Westchester County Health Care Corporation Act.

Given that no court has ruled on whether the actions of the Westchester County Health Care Corporation are subject to state action immunity from the antitrust laws, the Westchester County Health Care Corporation, and other similarly situated public hospitals, cannot now predict their

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[25] Eight of fifteen directors are appointed by the governor, while the others are appointed by the county. Since the state controls over half of the public corporation, it is possible that the corporation may be immune as a state actor under applicable Eleventh Amendment case law. *See supra* I.B.

ability to engage in exclusive contracts free from antitrust challenge. Indeed, this confusion makes eventual challenge on antitrust grounds almost a certainty. This eventuality seems likely despite the fact that suits contesting exclusive contracts are rarely successful, and despite the fact that there is at least some likelihood that the Westchester County Health Care Corporation would be found to have Eleventh Amendment and/or state action immunity from the antitrust laws as either a state or local actor. Because of the possibility of extracting a settlement from a hospital already under financial pressure, a disgruntled provider excluded by even a procompetitive exclusive arrangement could view a lawsuit as an effective strategy, regardless of prospects on the merits.

III. The Court Should Grant the Petition to Address the Substantial Harm Caused by the Fifth Circuit's Errors

The Fifth Circuit's decisions are causing substantial confusion and harm. Confusion regarding the standard that applies to hospital actions necessarily will inhibit public hospitals from pursuing cost effective measures that enhance their competitive stance in the markets in which they operate. If public hospitals enter into exclusive contracts they may subject themselves to potentially costly litigation. If they do not, their ability to survive in the marketplace may be threatened, since they will be unable to operate the hospital as efficiently as possible in an increasingly competitive health care marketplace.

Uncertainty concerning the scope of state action immunity will prompt antitrust actions of dubious merit against public hospitals and could easily result in the expenditure of millions of dollars of public funds to defend them. Public hospitals are funded largely by public money, whether through a governmental budget line-item, direct subsidies provided by state or local governments, or indirectly through publicly-funded health care under Medicare or Medicaid. Increased litigation costs hamper the public hospital in carrying out its state-authorized public functions.

In addition, public hospitals, which often operate in difficult budgetary situations, are more likely than other institutions to be averse to subjecting themselves to potentially expensive litigation and may expend significant public funds to settle actions of ultimately dubious merit. Increased exposure to lawsuits will thus only detract from the public hospital's ability to deliver needed public services, services the states and localities involved are trying to deliver efficiently and effectively.

The confusion caused by the Fifth Circuit decision also places additional burdens on state legislatures as they struggle to determine what they must do to maintain immunity for the public hospitals operating under state statutes. In order to provide immunity to a public hospital, the state must either make the public hospital part of the state, thus permitting Eleventh Amendment immunity[26] or determine a way to convey to reviewing courts that all potentially anticompetitive uses of exclusive arrangements that could result from an authorizing statute have been "foreseen." In order to assure that they meet this demanding standard, state legislatures may need to re-examine their statutes and require significant changes. To the extent legislatures decide changes are needed to confirm the existence of intended state action immunity, legislatures may need to employ antitrust counsel to determine whether and how to make the appropriate findings to clarify their intent. The burden of foreseeing all potentially anticompetitive conduct will not be an easy one to meet,

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[26] While this Court has stated that the threat of antitrust liability should not influence the form which a corporate parent chooses for a subsidiary, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771-74 (1984), this is precisely the result dictated by *Surgical Care*'s "foreseen" standard. A state legislature determined to avoid the costs associated with interpreting *Surgical Care* and satisfying its requirements might reorganize its public hospitals simply to avoid its reach. Just as the parent in *Copperweld* had complete autonomy to select its subsidiary's corporate form, so too does a state legislature determine the form for its public hospitals, which are all creatures of state law.

particularly because investigations into the anticompetitive nature of exclusive contracts are necessarily fact specific and market-dependent. *See Jefferson Parish*, 466 U.S. at 44-47 (O'Connor, J.); *Omega Envtl., Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1162-65 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 46 (1998).

The impact of the Fifth Circuit approach in increasing the burdens on state legislatures to clarify their intent regarding state action immunity is particularly ironic given this Court's observation in *Parker* that the Sherman Act and its legislative history contained "no suggestion of a purpose to restrain state action." 317 U.S. at 351. The Fifth Circuit's decision would mandate additional legislation in order to assure application of state action immunity. The imposition of such an increased burden is contrary to the very principles of federalism that underlie *Parker* v. *Brown*.

CONCLUSION

For the above stated reasons, we urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: October 1, 1999

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

No. 99-210

In the Supreme Court of the United States

HOSPITAL SERVICE DISTRICT NO. 1
OF TANGIPAHOA PARISH, ET AL.,
Petitioners,

v.

SURGICAL CARE CENTER OF HAMMOND,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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October 1, 1999

QUESTION PRESENTED

Whether local antitrust immunity arises (i) only when state law provides a specific grant of statutory authority that "displaces competition" and "necessarily contemplates" the challenged anticompetitive activity (as the Fifth Circuit held here), or instead (ii) when the local government's anticompetitive conduct could be "reasonably foreseen" from a state's broad grant of authority (as the Fourth and Eleventh Circuits hold)?

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and State courts to defend and promote free enterprise and individual rights. WLF has appeared before this Court in cases involving federalism. *See, e.g.*, *Reno* v. *Condon*, No. 98-1464; *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). WLF submits this brief in support of Petitioners and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the petition for writ of certiorari. Additionally, we wish to emphasize certain aspects of the record. The consolidated petition centers on three judgments of the U.S. Court of Appeals for the Fifth Circuit: *Hospital Service District No. 1 of Tangipahoa Parish, et al.* v. *Surgical Care Center of Hammond, L.C.*, 153 F.3d 220 (5th Cir. 1999) (*Tangipahoa Parish*); *City of Bossier City, et al.* v. *Willis-Knighton Medical Center*, Pet. App. 33 (unpublished opinion);[2] and *Richland Parish Hospital Service District 1-B, et al.* v. *Ralph Abraham, M.D., et al.*, *Id.* at 53 (unpublished opinion). Because

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, contributed monetarily to the preparation and submission of this brief.

[2] Pursuant to SUP. CT. R. 46.1 *City of Bossier City, et al.* v. *Willis-Knighton Medical Center* was dismissed on September 21, 1999. No further discussion of that case is therefore necessary.

Tangipahoa Parish is the lead case on which the Fifth Circuit relied to resolve all three, we will rehearse only its facts.

Petitioner Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Medical Center (North Oaks) is a political subdivision of the State of Louisiana. *See* LA. REV. STAT. ANN. § 46:1064(a); *Bertrand* v. *Sandoz*, 255 So. 2d 754 (La. 1971). It operates a hospital in Hammond, Louisiana, which offers a variety of medical services, including inpatient and outpatient surgery. *See* Pet. 7. Respondent Surgical Care Center of Hammond, L.C., d/b/a St. Luke's SurgiCenter (St. Luke's) is a for-profit hospital "located a quarter mile from North Oaks" that offers many of the same services as North Oaks, but solely on an outpatient basis. *Id.*

St. Luke's filed a complaint against North Oaks in U.S. District Court, accusing North Oaks of violating the Sherman Act, 15 U.S.C. § 1, and State laws governing monopolies, LA. REV. STAT. ANN. § 51:123, unfair trade practices, *id.* at § 15:1405, and consumer protection, *id.* at § 15:1409. *See* Pet. 7–8. In particular, the complaint charged that North Oaks had engaged in illegal tying arrangements by using its alleged monopoly over inpatient services to goad five of the seven largest local managed care plans into signing exclusive contracts. *Id.* at 8.

St. Luke's complaint was dismissed. *Id.* The court ruled, "The plain language of [Louisiana's Hospital Service District Law] authorizes hospitals to contract with any entity to promote the delivery of health services. North Oaks has seen fit to do this by entering into exclusive contracts with health care plans whenever possible." Pet. App. 28. According

to the court, North Oaks' exclusive contracts and other alleged anticompetitive activity were "an entirely foreseeable result of the Louisiana legislation." *Id.* As such, North Oaks' conduct was merely an "attempt to cure the competitive disadvantage suffered by the hospital service districts, the stated goal of the 1984 'competition' amendments." *Id.* St. Luke's appealed, and a panel of the Fifth Circuit unanimously affirmed. *See id.* at 19.

The Fifth Circuit then granted *en banc* review and reversed, holding that the Louisiana Hospital District Law, LA. REV. STAT. ANN. § 46:1051 (HSD law), did not entitle North Oaks to immunity from St. Luke's federal antitrust claim. "The Louisiana legislature did not make sufficiently clear an intent to exercise its authority to insulate its creature of state government from the constraints of the Sherman Antitrust Act . . . ." Pet. App. 2.

The court found the key to deciding the case in the "distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitve activity from one that merely allows a municipality to do what other businesses can do." *Id.* at 7. The court defended this distinction as a servant of federalism.

> First, courts will not police states to insist that its legislatures use words federally dictated. We will find a purpose to insulate local government when language and context fairly locate a state policy to displace competition. Second . . . courts will not infer such a policy to displace competition from naked grants of authority. . . . To infer a policy to displace competition from, for example, authority to

> enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant.

Id. at 9–10.

Applied to *Tangipahoa Parish*, the court concluded that this distinction cut against North Oaks' claim of immunity. It found that "[t]he Louisiana statute did not subject St. Luke's or any other businesses to the authority of the hospital service district." *Id.* at 7. And it reasoned that since "[n]ot all joint ventures are anticompetitive . . . it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct." *Id.* The court therefore reversed and remanded. Soon afterward it relied on *Tangipahoa Parish* as authority for deciding *Richland Parish Hospital Service District 1-B, et al.* v. *Ralph Abraham, M.D., et al.*, *id.* at 53, in a short, per curiam, unpublished decision. Petitioners subsequently filed a consolidated petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

The Fifth Circuit has held that State political subdivisions enjoy immunity from federal antitrust claims only if a State statute "necessarily contemplates the anticompetitive activity." Pet. App. 7. This decision deserves plenary review for at least three reasons. First, it raises a true conflict among four circuits around the country. Second, that conflict centers on a point of federal law of deep importance

to federal-state relations and local self-government. Determining precisely when the States' political subdivisions can obtain federal antitrust immunity shapes the relationship between States and their political subdivisions, as the former decide when and how to confer such immunity on the latter. The legal standard governing local antitrust immunity also affects how deeply federal courts will become enmeshed in overseeing local government operations and whether local government can remain creative and fully responsive to local needs. Third, the decision below also harbors serious errors that call for this Court's correction.

REASONS FOR GRANTING THE WRIT

A "compelling reason[ ]," SUP. CT. R. 10, for granting a petition for certiorari arises when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* at 10(a). Distinguished commentators have identified intercircuit conflicts as an especially strong reason for granting review. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 168 (7th ed. 1993). Even so, not all intercircuit conflicts merit review. Justice Harlan wrote that "a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." John Marshall Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108 (1959), *quoted in* STERN, SUPREME COURT PRACTICE, at 169. "What

may be necessary, therefore, is a conflict on an important issue—or at least not too unimportant an issue." *Id.* at 171. The conflict at issue in this case amply satisfies that test.

I. THE QUESTION PRESENTED, WHICH TURNS ON A BONA FIDE CONFLICT AMONG FOUR U.S. COURTS OF APPEALS, MERITS REVIEW BECAUSE IT INVOLVES IMPORTANT MATTERS OF FEDERALISM AND LOCAL SELF-GOVERNMENT

The Fifth Circuit has held that State political subdivisions get local antitrust immunity only if a State statute "necessarily contemplates the anticompetitve activity," Pet. App. 7, rather than "merely allow[ing] a municipality to do what other businesses can do." *Id.* This holding creates a direct conflict among four federal courts of appeals. To one side stand the decisions of the Fifth Circuit in this case and the Ninth Circuit in *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). On the other side stand the decisions of the Fourth Circuit in *Coastal Neuro-Psychiatric Associates* v. *Onslow Memorial Hospital*, 795 F.2d 340 (4th Cir. 1986) and the Eleventh Circuit in *FTC* v. *Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994). Encompassing four circuits and touching diverse areas of the Nation, this conflict is intolerable because it is both direct and widespread. Furthermore, the conflict centers on a point of law with broad and deep implications for federalism and local self-government. To better explain those implications, it is helpful to begin by reviewing why States enjoy immunity from federal antitrust claims in the first place.

Fifty-six years ago this Court recognized that the Sherman Act, 15 U.S.C. § 1, which declares unlawful "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," *id.*, does not embrace claims premised on "the anticompetitive conduct of a State acting through its legislature." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985). In a frequently cited passage the Court explained why federal antitrust claims do not cover the actions of State governments.

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. *Brown*, 317 U.S. 341, 350–51 (1943). The Court has understood *Parker* as being "grounded in principles of federalism," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992), and it has consistently affirmed that understanding. *See, e.g.*, *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 370 (1991); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987); *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985); *Community Communications Co.*, v. *Boulder*, 455 U.S. 40, 53 (1982).

While States merit *Parker* immunity directly, however, their political subdivisions receive such

protection from antitrust liability only if their anticompetitive conduct is the "'foreseeable result' of what the [State] statute authorizes." *City of Columbia*, 499 U.S. at 373. By focusing the inquiry on whether a State legislature has authorized a political subdivision to engage in anticompetitive conduct, the Court has attempted to walk a tightrope between "preserv[ing] to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion of Brennan, J.), and not allowing "purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 416. An intercircuit conflict over the correct standard for distinguishing valid from invalid assertions of *Parker* immunity by States' political subdivisions thus carries profound implications for federalism. *See* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 222b, at 393 (rev. ed., 1997).

A. The Question Presented Involves Important Matters Regarding Federalism and Local Self-Government

Several reasons distinguish the Question Presented as being especially important. The standard of local antitrust immunity affects the entire range of State political subdivisions, including cities, towns, water and sewer districts, hospital districts, and every other political subdivision capable of being sued under federal antitrust law and of being shielded from suit under *Parker*. All these will decide how to deliver government services—and even whether they can deliver certain services at all—based in part on

whether they can safely avoid antitrust liability under federal law.

The Question Presented is also important because the standard governing local antitrust immunity has the power to shape the relationship between States and their political subdivisions. *See, e.g.*, *Community Commun. Co.* v. *City of Boulder*, 455 U.S. 40, 70, 71 (1982) (Rehnquist, J., dissenting). Framed one way, that standard may saddle State governments with requirements that impede or delay their ability to delegate to their political subdivisions the authority to engage in anticompetitive conduct in order to deliver government services. Framed another, it may free States and local governments to deliver government services in ways that creatively and responsively meet the needs of the people they serve. *See City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 439–40 (Stewart, J., dissenting).

The Question Presented is important, as well, because it affects the actual delivery of government services. Ordinarily, "States are accorded wide latitude in the regulation of their local economies under their police powers," *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976), meaning that federal decisional law will not lightly "displace[ ] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require" *National League of Cities* v. *Usery*, 426 U.S. 833, 847 (1976), *overruled on other grounds by Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The difficulty lies with the fact that "[i]n the exercise of their powers local governmental entities often take actions that might violate the antitrust laws if taken by private persons, such as granting exclusive franchises, enacting restrictive

zoning ordinances, and providing public services on a monopoly basis." *City of Lafayette*, 435 U.S. at 439 (Stewart, J., dissenting). By adopting an overly cramped standard of local antitrust immunity, federal courts may halt social and economic experimentation by State political subdivisions, contrary to this Court's longstanding conviction that such creativity benefits the entire Nation.

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. *Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

As this passage from Justice Brandeis suggests, the Question Presented is important because it touches on particularly sensitive areas concerning the interaction between federal courts and State and local governments. Unnecessarily discouraging governmental experimentation not only may prevent beneficial experiments from being tried, it is equally troubling because it permits federal courts to reverse the considered judgments of State and local officials on less than compelling legal grounds. Accordingly, Members of the Court have recognized that "extensive

interference with the fundamentals of state government is not a proper function of the federal judiciary." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 438 (1978) (Stewart, J., dissenting). Armed with a cramped definition of local antitrust immunity, an overactive judge can find opportunities for such interference almost constantly, including whenever "a city grants an exclusive franchise, or chooses to provide a service on a monopoly basis, or refuses to grant a zoning variance to a business, or even . . . brings litigation on behalf of its citizens . . . ." *Id.* That is why Members of the Court have concluded that a grudging rule of local antitrust immunity openly invites "the sort of wide-ranging inquiry into the reasonableness of state regulations that this Court has forsworn." *Id.* at 439.

The importance of the Question Presented is also borne out by the presence of an unsettled subsidiary issue. As hospital service districts organized pursuant to Louisiana law, *see* LA. REV. STAT. ANN. § 46:1064(a), Petitioners are by definition commercial participants in the medical care market. This naturally raises the question whether *Parker* immunity applies to the political subdivision of a State when it acts as a market participant. The Court's case law is in some tension on this point. In *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365 (1991), the Court noted in passing that *Parker* appeared to say that antitrust immunity "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Id.* at 374–75. Later in the opinion, however, it referred only to "the *possible* market participant exception." *Id.* at 379 (emphasis added). That possibility appears to depend on the premise that "[t]he basic distinction drawn . . . between States as market participants and

States as market regulators makes good sense and sound law." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436 (1980).

A recent decision has cast significant doubt on this proposition. When faced with deciding the validity of the Trademark Remedy Clarification Act, 15 U.S.C. § 1125(a), which permitted suits against States for misleading advertising, a majority of the Court concluded that the Act unconstitutionally violated the States' sovereign immunity. *See College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999). To reach that conclusion, the Court flatly rejected the argument that States were subject to suit merely because they had entered a market as commercial participants.

> The "market participant" exception to judicial created dormant-Commerce-Clause restrictions makes sense because the evil addressed by those restrictions—the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens . . . is entirely absent where the States are buying and selling in the market. In contrast, a suit by an individual against an unconsenting State is the very evil at which the Eleventh Amendment is directed—and it exists whether or not the State is acting for profit, in a traditionally "private" enterprise, and as a "market participant." In the sovereign-immunity context, moreover, "[e]venhandedness" between individuals and States is not to be expected: "The constitutional

role of States sets them apart from other employers and defendants."

Id. at 2230–31 (1999) (quoting Welch v. Texas Dept. of Highways and Pub. Transp., 483 U.S. 468, 477 (1987)) (other citations omitted). No matter how the Court chooses to resolve whether *Parker* contains a market participant exception, the importance of the question is striking—especially when more and more States are entering commercial markets. *See, e.g., Id.*; *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 119 S. Ct. 2199 (1999)

B. Declining Review Would Bring Undesirable Consequences for Federalism and Local Government

The importance of the Question Presented is also underscored by the undesirable consequences that would follow if this Court declines to review the decision below. Perhaps the most serious consequences will flow from the "intolerable legal uncertainty," *Waters* v. *Churchill*, 511 U.S. 661, 692 (1994) (Scalia, J., concurring in the judgment), engendered by a direct conflict among four circuits on a point of law as essential as the standard for determining the presence of local antitrust immunity. Declining review would mark a substantial departure from this Court's practice of seeking to resolve important points of law that have lapsed into uncertainty. *See, e.g., United States* v. *Cowden Mfg. Co.*, 312 U.S. 34, 36 (1941); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 24 (1991) (Scalia, J., concurring in the judgment). The need for certainty is heightened where, as here, an intercircuit conflict leaves sovereign States uncertain of their rights and obligations under federal law.

In addition, by framing the standard of local antitrust immunity in terms of whether a State statute "necessarily contemplates," Pet. App. 7, anti-competitive activity, the court of appeals has presented States in the Fifth Circuit with a Hobson's choice. State legislatures there can review the statutes governing their political subdivisions *in toto* and amend them one-by-one, to ensure that they contain sufficiently emphatic statements of their intent to authorize anticompetitive conduct. Or they can avoid this federally-mandated spring housecleaning by accepting the risk that political subdivisions engaging in anticompetitive conduct will almost certainly face federal antitrust litigation, with its attendant costs. Either choice deprives States and their subdivisions of a substantial degree of autonomy. This result is especially ironic, given this Court's determination that "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350–51 (1943).

If left unreviewed, the decision below threatens to undermine the salutary effects of this Court's recent federalism decisions. Over the past eight years this Court has breathed new life into federalism in decisions under the Commerce Clause, *United States* v. *Lopez*, 514 U.S. 549 (1995); Section 5 of the Fourteenth Amendment, *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); the Tenth Amendment, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991); *New York* v. *United States*, 505 U.S. 144 (1992); *Printz* v. *United States*, 521 U.S. 898 (1997); the Eleventh Amendment, *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); and in a trio of decisions applying the principle of state sovereign immunity, *Alden* v. *Maine*, 119 S. Ct. 2240

(1999); *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2230–31 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 119 S. Ct. 2199 (1999). Taken as a group, these cases leave States and their political subdivisions freer to operate without federal oversight and control. The decision below accomplishes exactly the opposite results.

The Fifth Circuit defended its holding, in part, on the ground that inferring local antitrust immunity too readily can harm the values and interests protected by federalism.

> To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant.

Id. at 9–10. By appearing to defer to principles of federalism, this reasoning has some superficial appeal. On closer examination, however, the court's argument collapses.

The court wrote that federalism required it to avoid finding *Parker* immunity for State political subdivisions too easily because doing so would "creat[e] an instrument of local government with power the state did not intend to grant." *Id.* If the Fifth Circuit is right, States will have to massively restructure their conduct to satisfy federal law. Any attempt by a political subdivision to act in noncompetitive ways would be shielded from federal

antitrust liability only if the State legislature specifically authorized the precise act at issue. On the other hand, a less grudging view of local antitrust immunity would allow States and their political subdivisions to act without fear of federal antitrust liability, unless a State legislature specifically wishes to bar a political subdivision from acting anti-competitively and passes a statute to that effect. With all due respect, it is the Fifth Circuit whose decision "stand[s] federalism on its head." *Id.* at 9.

II. The Lower Court Decision Is Marred by Substantial Errors that Require this Court's Prompt Correction

While it is true that "the correctness or erroneousness of the decision below is not meant to be the central focus of the Court's exercise of its certiorari jurisdiction," ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 193 (7th ed. 1993), the Court's decisions tend to establish that "a showing of the importance or unimportance of review may be dependent upon whether the decision below is to be accepted or overturned." *Id.* at 195. For that reason we have included a brief discussion of what we regard as the lower court's more prominent errors.

The Fifth Circuit chiefly erred in two ways. First, it reverted to a superseded statement of the rule governing local antitrust immunity. In specific, it tacitly rejected the Court's post-*Lafayette* decisions, which clarify the standard of local antitrust immunity in terms of the "'foreseeable result' of what the [State] statute authorizes." *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 373 (1991).

Second, the court smuggled into its statement of that standard the concept of compulsion. It accomplished this impressive feat of legerdemain by adding the adjective "necessarily" to the old rule that local antitrust immunity exists when "'the legislature contemplated the kind of action complained of.'" *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion) (footnote omitted) (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)). "Necessarily" implies that local antitrust immunity exists only if a State legislature *compels* its political subdivisions to engage in anticompetitive conduct. Yet this Court unanimously rejected an invitation to include compulsion as an element of local antitrust immunity 14 years ago.

> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of statute of this kind.

Town of Hallie v. *City of Eau Claire*, 471 U.S. 34, 43 (1985). Given this Court's rejection of compulsion as a "prerequisite" to finding *Parker* immunity for State political subdivisions, the Fifth Circuit's attempt to frame the standard of local antitrust immunity in terms of "necessity," a term of compulsion, is manifestly erroneous.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation urges the Court to grant the petition.

Respectfully submitted,

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October 1, 1999

Supreme Court, U.S.
FILED
OCT 14 1999
OFFICE OF THE CLERK

No. 99-210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

Hospital Service District No. 1 of Tangipahoa Parish, *et al*,
Petitioners,

v.

Surgical Care Center of Hammond,
Respondent.

Richland Parish Hospital Service District 1-B, *et al*,
Petitioners,

v.

Ralph Abraham, M.D., *et al*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY OF THE PETITIONERS

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October 14, 1999

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REPLY OF THE PETITIONERS

Respondents' Brief in Opposition ("BIO") in no way undercuts the reasons for granting certiorari in these consolidated cases. In particular, Respondents fail to rebut the clear circuit conflict demonstrated by the Petition. The Fifth Circuit refused to accord antitrust immunity in these cases on the ground that the Louisiana Hospital Service District law ("HSD law") does not "subject [Respondents] to the authority" of Petitioners through regulation and does not "necessarily contemplate[]" the challenged anticompetitive conduct. Pet. App. 7. By contrast, the Eleventh Circuit consistently holds that antitrust immunity arises from indistinguishable public hospital statutes and expressly "*reject[s]* the suggestion that, in order to render anticompetitive conduct foreseeable, a state must enact either specific legislation from which anticompetitive conduct must ordinarily or routinely occur or specific legislation creating regulatory or monopolistic powers." *FTC* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184 (1994) ("*Lee County*") (emphasis added). The Fourth Circuit similarly holds that indistinguishable public hospital statutes create immunity and avowedly "deal[s] leniently with the question of legislative contemplation of an anticompetitive effect." *Omni Outdoor Advertising* v. *City of Columbia*, 891 F.2d 1127, 1132 (1989), *aff'd*, 499 U.S. 365 (1991); *Coastal Neuro-Psychiatric Assocs.* v. *Onslow Mem. Hosp.*, 795 F.2d 340 (1986) ("*Coastal Neuro*").

Respondents never confront these points, but instead resort to misdirection. Working from the premise that the HSD law announces a purpose to increase competition between public and private hospitals, Respondents repeatedly assert that anticompetitive conduct is not the "foreseeable result" of the statute. Not only does that argument have nothing to do with the circuits' conflicting legal standards, but Respondents' premise is itself false. Specifically, Respondents rely on two words – "equally" and "effectively" – in an unrelated

provision of the HSD law that *expressly* do not apply here. Moreover, as state authorities uniformly have concluded, Pet. 21, even those two words announce only Louisiana's intent to compensate for various competitive disadvantages that burden all public hospitals, not an intent to "increase competition" generally in the market for hospital services. At bottom, Respondents' confusing and erroneous construction of the HSD law is nothing more than an attempt to portray these cases as fact-bound when in reality the Petition squarely presents a plain, important, and recurring conflict in the circuits.

Certiorari also is warranted because the scope of antitrust immunity bears directly on the relationship between the federal government and sovereign states. Specifically, because this question determines how state governments structure their relationships with their political subdivisions, the Fifth Circuit's restrictive standard and the confusion in the circuits generally may compel states to rewrite a variety of laws in order to provide continued insulation from federal antitrust liability. *Accord* Br. *Amicus Curiae* of Washington Legal Foundation 8-13. Although Respondents suggest that this Court's decisions in *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365 (1991) ("*City of Columbia*"), and *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) ("*Town of Hallie*"), sufficiently address the standard for finding antitrust immunity, the conflicting rules adopted by the courts of appeals establish that more guidance is needed than the unelaborated "foreseeability" standard announced in those cases. Just as important, Respondents do not dispute that this Court has yet to articulate how immunity applies when, as in these and many other cases, local governments compete directly against private businesses. Nor do Respondents dispute that the question presented recurs frequently, a point well illustrated by a newly filed petition for certiorari in an antitrust immunity case from the Ninth Circuit. *Redwood Empire Life Support* v. *County of Sonoma*, No. 98-15170,

1999 WL 700577 (9th Cir. Sept. 10, 1999) (petition for cert. filed Oct. 12, 1999).

Finally, contrary to Respondents' suggestion, BIO 23, this Petition is properly considered at this time. Further proceedings in the district court will not shed light on the question to be presented to this Court, and Respondents do not contend otherwise, because under this Court's precedents Petitioners' immunity is to be judged at the outset of the case based on the allegations of the complaint. Respondents therefore cannot identify any reason why the proceedings on remand would assist this Court's resolution of the antitrust immunity issue. Moreover, the entire point of local antitrust immunity is to ensure that political subdivisions are "immunized *from suit*," *City of Lafayette* v. *Louisiana Power & Light*, 435 U.S. 389, 413 n.41 (1978) (plurality opinion) (emphasis added), not merely from liability. The immunity doctrine thus is intended to prevent Petitioners from undergoing the cost and burden of two sets of proceedings in both the district court and court of appeals only to later establish in this Court that these cases should have been dismissed at the outset. Presumably for these reasons, this Court granted certiorari in one of its leading municipal antitrust immunity cases – *City of Lafayette* – in precisely this procedural posture.

I. Respondents Seriously Misconstrue The One Provision Of The HSD Law On Which They Rely.

The one statute on which Respondents rely to establish Louisiana's supposed pro-competitive intent, La. Rev. Stat. 46:1071, simply is not relevant. In particular, Respondents fail to advise the Court of critical language that expressly limits the application of § 1071. Contrary to the brief quotation set forth in the BIO, § 1071 *actually* provides: "The legislature hereby declares that *the purpose of R.S. 46:1071 through 1076* is to enhance the ability of a hospital service district to compete effectively and equally in the market for health care services. Towards this end, *the provisions of R.S. 46:1071 through 1076* shall be construed liberally." La. Rev.

Stat. 46:1071, *reprinted at* Pet. App. 95 (emphasis added).[1] As Petitioners explain below, the statutes referenced in this provision (§§ 1071-76) have nothing to do with the conflict between the decisions below and rulings of the Fourth and Eleventh Circuits.

In addition, Respondents misconstrue even the two words – "equally" and "effectively" – on which they rely. As the Petition explained, at 19-20, this provision in context simply announces the legislature's intent to *compensate* for pre-existing competitive disadvantages that burden public hospitals, which the state did not withdraw.[2] Respondents also are

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[1] Respondents thus are wrong to state that "[b]ecause Section 1077 was enacted one year after Sections 1071-76, petitioners suggest that Section 1077 should be interpreted without regard to Section 1071." BIO 15 n.9. Instead, the purpose language on which Respondents' rely could not be more explicit in applying only to §§ 1071-76.

[2] Thus, only Petitioners' reading of § 1071 is consistent with the realities of "the health care market * * * in which public hospitals operate." Br. *Amicus Curiae* of National Association of Public Hospitals & Health Systems 8; Pet. 20. Respondents advance a contrary history of the HSD law, but do so only by adding language to § 1071 that simply does not exist and by putting forward a construction that not even the Fifth Circuit endorsed. Section 1071 sets out the legislature's finding that "hospital[s] and other health care providers are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public" and that "this increasing competition is forcing hospitals and other health care providers to develop market[ing] strategies and strategic plans to effectively compete." La. Rev. Stat. 46:1071, *reprinted at* Pet. App. 95. But Respondents reword the statute as if it states that only "private providers," BIO 4 (quotations adding bracketed material), are entering into "joint ventures" and developing "market[ing] strategies," in order to argue that the legislature intended only to provide an "equal" power to public hospital districts.

That Respondents' argument turns entirely on words that are not in the statute speaks for itself. The statute properly is read to mean what it says, which is that the legislature recognized that the entire hospital market was becoming more competitive and that all hospitals – both

wrong to maintain that the provisions cited by the competition proviso (§§ 1071-76) do nothing more than "exempt[] public hospitals from certain laws applicable to public agencies, including various sunshine laws," BIO 4, given that every single provision cited by Respondents also provides an exemption from "*any law to the contrary*."[3] This is the view uniformly adopted by statute authorities, Pet. 21, and the contrary view of the decisions below can only "embroil the federal courts in the unnecessary interpretation of state statutes," *City of Columbia*, 499 U.S. at n.4.[4]

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public and private – were engaging in joint ventures. As the Petition explained and Respondents do not contest, public hospital districts possessed all corporate powers including the power to enter into joint ventures *prior* to the adoption of § 1071; nor has there ever has been a prohibition on "marketing strategies." Pet. 19; La. Rev. Stat. 46:1052(5) (power "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services"), *id.* 46:1060 (hospital districts "shall constitute a body corporate in law with all the powers of a corporation").

[3] *See* La. Rev. Stat. 46:1073(A) (power to develop "marketing strategies" "notwithstanding any law to the contrary"); *id.* 46:1073(B) ("Notwithstanding the provisions of R.S. 42:4.1 et seq. [public meeting requirement] or any other law to the contrary"); *id.* 46:1073(C) ("Notwithstanding the provisions of R.S. 44:1 et seq. [public records law] or any other law to the contrary"); *id.* 46:1074 ("notwithstanding the provisions of R.S. 41:1211 et seq. [public leasing law] or any other law to the contrary); *id.* 46:1075 ("notwithstanding the provisions of R.S. 43:111 et seq. [public advertising law] or any other law to the contrary")), *reprinted in* Pet. App. 97-100.

[4] Respondents quote Op. La. Atty. Gen. 95-346 (Aug. 18, 1995), which only paraphrases the legislature's intent "to permit the hospital service district equal ability to compete." BIO 5. In more recent opinions that actually give meaning to the words "equal" and "compete," the State Attorney General expressly has concluded that the statute grants "broad and sweeping authority" and "broad authority to execute contracts of every kind in order to carry out the objects and purposes of a [hospital] district." Op. La. Att'y Gen. 96-510 (Jan. 14, 1997); Op. La. Att'y Gen. 96-350 (Oct. 29, 1996).

II. The Circuits Are Substantially Divided Over The Appropriate Test For Finding Local Antitrust Immunity And Specifically Are Divided Over Whether Immunity Arises From Public Hospital Statutes Indistinguishable From The HSD Law.

The en banc Fifth Circuit in these cases did not merely invoke this Court's "foreseeability" standard, *contra* BIO 10, but instead, like the Fourth and Eleventh Circuits before it, articulated its own test for finding local antitrust immunity.[5] Specifically, the court of appeals grounded its holding on the "distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do." Pet. App. 7. The court specified in "[a]pplying this distinction" both that immunity applies only when the state "subjects [private] businesses to the authority" of local government and furthermore that the joint venture provision of the HSD law does not provide immunity because "[n]ot *all* joint ventures are anticompetitive." *Id.* (emphasis added).[6] The Fourth and Eleventh Circuits have rejected such conditions on immunity and have reached the opposite result on essentially identical facts.

A. The Eleventh Circuit

The Eleventh Circuit repeatedly has found antitrust immunity in indistinguishable cases. The Fifth Circuit itself all but acknowledged the conflict, as do Respondents. Pet. App. 9

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[5] Petitioners do not maintain that the Fifth Circuit requires that states invoke "a magical phrase" in order to confer immunity. *Contra* BIO 14 (misquoting an unrelated discussion at Pet. for Cert. 16). Instead, the Fifth Circuit plainly finds immunity only when state law meets the substantive criteria on which the decisions below rest.

[6] Respondents themselves seem to acknowledge that this aspect of the decision below is erroneous, given that not *all* zoning – the municipal power at issue in *City of Columbia* – is anticompetitive either. BIO 13 n.7.

("The Eleventh Circuit's decision lies closer to the margin."); BIO 18 (*Lee County* "is close[] but still distinguishable"). *Accord* Pet. for Cert. 22 (explaining that the Eleventh Circuit rejected the standard adopted below when it was raised by the U.S. Federal Trade Commission, and that the F.T.C. now maintains that Eleventh Circuit precedent is "wrongly decided").

This conflict is manifest because it extends to three legal issues, Pet. 23-24, none of which Respondents address. First, the Fifth Circuit requires that state law "necessarily contemplate[]" anticompetitive activity, Pet. App. 7, while the Eleventh Circuit consistently "has required only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute," *Lee County*, 38 F.3d at 1191.[7] Second, the Fifth Circuit withholds immunity where state law "merely allows a municipality to do what other businesses can do," Pet. App. 7, while the Eleventh Circuit awards immunity to public hospitals that are "given powers to act exactly as private hospitals would act," *id.* at 1184 n.5. Third, the Fifth Circuit goes still further in requiring that the state "subject [private] businesses to the authority of" the local government, Pet. App. 7, while the Eleventh Circuit awards immunity notwithstanding that the municipality has no "regulatory powers," 38 F.3d at 1184 n.5. Respondents dispute none of these legal conflicts, but to the contrary *repeatedly reinforce* the Petition's showing that the Fifth Circuit refused to find immunity in these cases because "[t]he Louisiana hospital service district law does not purport to confer upon municipalities *any* regulatory authority over

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[7] Respondents, in putting forward the most restrictive statement of the Eleventh Circuit's standard that they can find, say only that in that court "'there must be *some showing* that the anticompetitive results were more than *merely plausible*.'" BIO 20 (quoting *Lee County*, 38 F.3d at 1191 n.6) (emphasis added). This formulation only highlights the conflict with the Fifth Circuit's restrictive view of antitrust immunity.

the pertinent market," BIO 13 (emphasis in original), which unquestionably conflicts directly with Eleventh Circuit precedent. *See also* BIO 3, 8-9 (quoting Pet. App. 7), 9 ("Louisiana law places no such over-arching regulatory controls over the hospital services market.").

Respondents' argument that the Eleventh Circuit's decision in *Lee County* can be limited to its facts – *i.e.*, to cases involving a municipality with monopoly power – was addressed fully by the Petition, which explained that *five* other decisions of the Eleventh Circuit (as well as four district court rulings within that circuit) have applied the conflicting standard of *Lee County*, *none* of which involved a pre-existing monopoly. Pet. 25-26 & n.9. Respondents' alternative argument that La. Rev. Stat. 46:1071, but not the Florida statutes at issue in *Lee County*, purportedly contains "an express intent on the part of the state to promote competition," BIO 19, was addressed fully above because § 1071 is *irrelevant* for present purposes. As the Petition explained, and Respondents do not contest, the two provisions of Florida law at issue in *Lee County* are paralleled exactly by provisions of the Louisiana HSD law, which are not affected by § 1071.[8]

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[8] The Florida statutes in *Lee County* set forth a purpose for hospital districts to "establish and provide for the operation and maintenance of * * * facilities devoted to the provision of healthcare services," while Louisiana law sets forth a purpose "[t]o own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care." 1963 Fla. Spec. Laws ch. 63-1552, § 1, *as amended by* ch. 87-438, § 1; La. Rev. Stat. 46:1024. The Florida statutes also grant authority to "be a partner in, or participate in or control, any venture, corporation, partnership, or other organization, public or private * * * in furtherance of, the purposes and best interests of the hospital." Fla. Spec. Laws. ch. 63-1552, § 23, *as amended by* ch. 87-438, § 7. Louisiana not only grants hospital districts a parallel authority to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health services," but it also specifies that this authority is to be exercised "notwithstanding *any*

At the end of a footnote, Respondents also assert that *Lee County* can be distinguished because "the challenged anti-competitive conduct in *Lee County* involved the acquisition of another hospital." BIO 19 n.12. But any such distinction undermines Respondents' position. By any measure, the monopolist's acquisition of a competitor in *Lee County* would undermine competition *more* than the exclusive third-party contract before the Fifth Circuit. Yet *Lee County* awarded antitrust immunity while the Fifth Circuit denied it in these cases.

B. The Fourth Circuit

The Petition explained that the Fourth Circuit awards antitrust immunity when reduced competition "'may'" result from state law, Pet. 27 (quoting *Coastal Neuro*, 795 F.2d at 342), and that the Fourth Circuit's view is embedded in numerous precedents, one of which *this Court* affirmed. Respondents address all this authority only by stating that the Fourth Circuit's opinion in one case – *Coastal Neuro* – describes one of the North Carolina statutes in that case – under which public hospitals may withhold physician privileges – as conferring "'regulatory benefits.'" BIO 21 (quoting 795 F.2d at 342). That, of course, has nothing to do with the Fourth Circuit's well-established legal standard, and Respondents cannot and do not suggest that the Fourth Circuit limits antitrust immunity to statutes conferring regulatory authority. Moreover, even if this statement in *Coastal Neuro* were relevant, the obvious response is that Louisiana has an indistinguishable physician-privilege statute that is not subject to § 1071, but the Fifth Circuit nonetheless refused to find antitrust immunity. *See* Pet. 26-28 & nn. 10, 12.[9] That the Fourth

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other law to the contrary." La. Rev. Stat. 46:1077, *reprinted at* Pet. App. 100-01 (emphasis added).

[9] The North Carolina statute in question sets out neutral criteria for awarding physician privileges such as "education, training, experience, demonstrated competence and ability, and judgment and character," and then provides that "[n]othing in this Part shall be deemed to

Circuit found that the North Carolina law conferred "regulatory benefits" while the Fifth Circuit did not take the same view of the parallel Louisiana law only *highlights* the conflict between the views of those courts.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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Dated: October 14, 1999

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mandate hospitals to grant or deny to any such individuals or other privileges to practices in hospitals." N.C. Gen. Stat. § 131E-85(a). Louisiana's parallel statute provides that "[n]othing in this Section shall be construed to require the governing body of any nonprofit hospital to grant staff membership to any applicant, provided that each such applicant is considered on an individual basis regarding his qualification." La. Rev. Stat. 37:1301.

The other North Carolina statute invoked by the Fourth Circuit in *Coastal Neuro* authorizes "municipalities to construct, operate and maintain hospital and other facilities which furnish hospital, clinical and similar services" and "to cooperate with other public and private agencies and with each other." N.C. Gen. Stat. § 131E-5 (b), (d). The Louisiana HSD law is, again, indistinguishable. It authorizes municipalities to "own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care" and "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district." La. Rev. Stat. 46:1052(1), (5), *reprinted at* Pet. App. 70.